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91-1195

No. _____

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1991

BEIJING EVER BRIGHT INDUSTRIAL COMPANY,
Petitioner,

v.

TIMBER FALLING CONSULTANTS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a federal court exercise personal jurisdiction over an agency or instrumentality of a foreign state, consistent with the Due Process Clause of the Fifth Amendment, where the cause of action asserted is based on state law, but personal jurisdiction is based on an aggregation of the foreign defendant's contacts with the United States as a whole, rather than on its contacts with the state in which the federal court sits?

2. Where the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(b)(2), requires service of process on an agency or instrumentality of a foreign state to be made in conformance with "an applicable international convention on service of judicial documents," is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, T.I.A.S. No. 6638 (1969), the only such "applicable international convention," or, where the foreign state is not a signatory to the Hague Convention but does have a Consular Convention with the United States providing for, *inter alia*, methods of service of process on parties within the foreign state, does the FSIA require that those service methods agreed upon in that Consular Convention be followed?

3. Where a default judgment has been entered against an agency or instrumentality of a foreign state for its failure to appear and defend, is it "culpable conduct" sufficient to deprive that foreign defendant of relief pursuant to Fed. R. Civ. P. 60(b) where the foreign defendant's failure to appear came after receiving instructions from its government to disregard the claims brought against it because attempted service of the action did not comply with the foreign state's domestic law regarding service of judicial documents?

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties to the consolidated appeals before the United States Court of Appeals for the Ninth Circuit, whose judgment is sought to be reviewed with this petition, included petitioner Beijing Ever Bright Industrial Company and respondent Timber Falling Consultants, Inc.

In the case before the United States District Court for the District of Oregon, the additional parties were plaintiff Richmark Corporation, a California corporation, and counterclaim/third party claim defendants Peacock Manufacturing Company, Inc., a Texas corporation, Zhu Yuanchang, Eugene Wang, James Yang, and Francis Tong.*

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*These additional parties have been removed from the caption of the case because it is petitioner's belief that they have no interest in the outcome of this petition. Pursuant to Supreme Court Rule 12.4, petitioner is notifying the Clerk of the Court and the additional parties of this belief in a letter served and filed contemporaneously with this petition.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner Beijing Ever Bright Industrial Company ("Beijing Ever Bright") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on July 3, 1991.

OPINIONS BELOW

The district court entered default judgment against Beijing Ever Bright in an order and opinion dated May 31, 1990 (App. C). The opinion of the district court dated October 15, 1990, denying relief from the default judgment, is reported at 747 F. Supp. 1409 (D. Or. 1990) (App. B). The opinion of the court of appeals, dated July 3, 1991, is reported at 937 F.2d 1444 (9th Cir. 1991) (App. A); the petition for rehearing was denied on October 15, 1991 (App. D).

JURISDICTION

On July 3, 1991, the court of appeals entered an opinion (App. A) affirming both the district court's order for default judgment against petitioner and the district court's denial of petitioner's motion for relief from a default judgment; the court of appeals denied a timely filed petition for rehearing and suggestion for rehearing en banc on October 15, 1991 (App. D). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth Amendment to the United States Constitution, The Foreign Sovereign

Immunities Act, 28 U.S.C. §§ 1330 and 1608, and Federal Rule of Civil Procedure 60(b) are set forth in Appendix E.

STATEMENT OF THE CASE

This case concerns the constitutional and statutory limits on the authority of federal courts to exercise personal jurisdiction over an agency or instrumentality of a foreign state, and to enter a default judgment based thereon. It raises important questions under the Due Process Clause of the Fifth Amendment concerning the use of aggregated national contacts -- rather than contacts with the forum state -- to establish general personal jurisdiction, which questions this Court has twice noted but not decided, and over which the lower courts are divided. It also presents interpretations by the court of appeals of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1602, *et seq.*, ("FSIA") which conflict with important Congressional objectives and upset settled international expectations concerning the efficacy of consular conventions providing agreed upon methods for service of process, and concerning the respect due the domestic laws of foreign sovereigns regarding proper service of process within their borders. It also concerns the extent to which a foreign sovereign instrumentality's adherence to its own government's instructions not to respond to an attempted service of process which fails to comply with that sovereign's domestic law, or with the method of service agreed upon in a consular convention between that foreign state and the United States, can be regarded as "culpable conduct" for which it may be penalized when seeking relief from a default judgment under Fed. R. Civ. P. 60(b).

A. The Facts Material To This Court's Consideration Of The Questions Presented

1. *Beijing Ever Bright*

Petitioner Beijing Ever Bright Industrial Company ("Beijing Ever Bright") is a trading company incorporated under the laws of the People's Republic of China, and beneficially owned by the government of that country.[1] Beijing Ever Bright has no office, place of business, bank accounts, property, or agents in Oregon -- or in the United States. Certification of Liu Yan–Sheng, ER 225 at ¶ 28 ("Liu Cert.").[2] Beijing Ever Bright is not registered or qualified to do business in any state, has never delivered any goods to the United States, and does not regularly conduct or solicit business here.[3] *Id.* at ¶ 28. Beijing

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[1]Beijing Ever Bright is a subsidiary of a Hong Kong corporation, China Everbright Holdings Co. Ltd. Beijing Ever Bright has no wholly- or partially-owned subsidiaries. *See* Sup. Ct. Rule 29.1.

[2]References in this brief to "ER" and "App. Supp. ER" refer to the Excerpts of Record and Appellant's Supplemental Excerpts of Record submitted to the court of appeals. References in this brief to "Supp. ER" refer to portions of the record submitted to the court of appeals by respondent Timber Falling Consultants. "DCD" refers to the docket number of pleadings and orders in the district court record that were before the court of appeals, but were not specifically included in either party's excerpts of record.

[3]The court of appeals noted three Beijing Ever Bright contacts or transactions with parties in the United States not related to the transaction in this litigation: (1) negotiating export transactions with a California company, (2) transferring funds to a New York corporation, and (3) funding the purchase of a Pennsylvania corporation (albeit by a separate, unrelated firm). App. A at A-8.

Contrary to the court of appeals' indication, Beijing Ever Bright did dispute these factual allegations and the characterization thereof adopted by the court of appeals. Be that as it may, the record nevertheless demonstrates there is no connection between these "contacts" and the State of Oregon or the underlying transaction in this case. *See* Supp. ER 259, ¶¶ 5, 8 and Exh. C.

Ever Bright has never advertised or solicited business in Oregon. *Id.* at ¶ 28.

2. *The Contract*

In April 1988, Beijing Ever Bright negotiated, agreed to, and signed a contract in Beijing, People's Republic of China, with the original plaintiff in this action, Richmark Corporation ("Richmark"), a California corporation. *Id.* at ¶ 15-18. This contract was for the purchase of timber, worth approximately $ 24 million, to be delivered to the People's Republic of China. Beijing Ever Bright was aware that Richmark was a corporation based in California and that the timber it had contracted to purchase would originate in the United States. Beijing Ever Bright communicated with Richmark via telex and telegram, and in one instance arranged for a letter of credit to be issued by a Chinese bank in Richmark's favor. *Id.* at ¶¶ 17-18. The timber was to be loaded onto a ship at a port on the West Coast of the United States to be designated by Richmark. *Id.* at ¶ 16. Beijing Ever Bright, however, was not aware that Richmark in turn had contracted to purchase the timber from respondent Timber Falling Consultants, Inc. ("TFC"), an Oregon company. *Id.* at ¶¶ 19, 20, 29.

Richmark failed to procure the timber which it had contracted to sell to Beijing Ever Bright. Negotiations between Richmark and Beijing Ever Bright held in Beijing failed to correct the situation, so commercially reasonable cover -- substitute timber -- was obtained from another source in the United States. *Id.* at ¶ 18. The record indicates that the substitute timber procured for Beijing Ever Bright was loaded at ports in Oregon and California onto a ship, the M/S Morning Orchid, owned by a foreign shipping firm with which Beijing Ever Bright had contracted to carry the timber to the People's Republic of

China. Liu Cert. at ¶ 16-18.[4] Although a portion of the timber was inspected in Oregon on its behalf, no employees of Beijing Ever Bright were themselves in Oregon.

A representative of Beijing Ever Bright traveled to the United States to address Richmark's failure and attended a meeting in Los Angeles, California, which was also attended by a representative of TFC. The parties disagree on the nature of this meeting: it is Beijing Ever Bright's position that the meeting was an attempt to settle on a remedy for Richmark's failure to procure the timber; TFC claims that Beijing Ever Bright's representative demanded "unwarranted contract concessions," even though Beijing Ever Bright had never contracted with TFC. Liu Cert. at ¶ 32.

3. *The Litigation*

Richmark, without advising or informing Beijing Ever Bright, commenced this litigation against TFC for breach of contract in October, 1988, in the United States District Court for the District of Oregon. TFC responded by counterclaiming against Richmark and asserting third party claims against a Texas company related to Richmark called Peacock Manufacturing Company, Inc., against three of Richmark's or Peacock's employees and officers, and against Beijing Ever Bright[5] and one of its employees. TFC's claims alleged state law claims of breach of contract, fraud, and tortious interference with contract, all based on Oregon law, and federal and state RICO violations by plaintiff and all third party defendants; the bases for

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[4]TFC asserted, and the record indicates, that the ship was directed to the California and Oregon ports by Richmark, not Beijing Ever Bright. Amended Answer and Counterclaims, DCD 35 at ¶¶ 28, 36(d).

[5]Although named by TFC as a "counterclaim defendant," Beijing Ever Bright is a third-party defendant in this action, according to the designations set forth in Fed. R. Civ. P. 13 and 14.

federal jurisdiction in the district court were diversity (28 U.S.C. § 1332), federal question (28 U.S.C. § 1331),[6] and the Foreign Sovereign Immunities Act (28 U.S.C. § 1330).

4. *Attempted Service On Beijing Ever Bright*

There has never been a dispute as to any of the facts in this case regarding TFC's attempted service of process on Beijing Ever Bright. The record discloses that there is no "special arrangement for service" between TFC and Beijing Ever Bright, *see* 28 U.S.C. § 1608(b)(1), and that Beijing Ever Bright has no agent authorized to receive service of process in the United States. *See* 28 U.S.C. § 1608(b)(2).

There is, however, a consular convention between the United States and the People's Republic of China which provides for, *inter alia*, an agreed upon method for service of judicial documents through the consular officers. *See* the Consular Convention Between the United States and the People's Republic of China, 33 U.S.T. 2973, 2998; T.I.A.S. No. 10209 ("the Consular Convention") (Appendix F). Article 29 of that convention provides for service by a consular officer "to the extent permitted by the law of the receiving State." *See* App. F at F-9-10.

The relevant Chinese law governing service is also in the record. The Chinese law governing service of process by foreign litigants is set forth in the Notice Issued by Supreme People's Court, Ministry of Foreign Affairs and Ministry of Justice Concerning Some Questions Pertaining to Mutual Trust for Delivery of Legal Documents Between China and Foreign Countries Through Diplomatic Channels, Waifa (1986) No. 47, *see* Liu Cert. Exhibit A ("Waifa No. 47") (the original Chinese–language version and an English translation of Waifa No. 47 is provided at Appendix G). That Notice requires the embassy of the

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[6]But, *cf. infra* note 10 regarding dismissal of the federal and state RICO claims by the district court.

country in which the suit was filed to bring the document to be served to the consular department of the Ministry of Foreign Affairs for transmission to the relevant higher people's court, which must then appoint an intermediate people's court to deliver the document to the defendant. *Id.* at G-5.

It is in the record -- and undisputed -- that TFC did not attempt to follow the above channels for effective service on Beijing Ever Bright under Chinese law and the Consular Convention. Liu Cert., at ¶ 4; *see also* App. G. TFC instead attempted service on Beijing Ever Bright in March 1989 by sending a summons and a copy and Chinese translation of its amended answer and counterclaims to Beijing Ever Bright by a private courier, DHL Worldwide Courier.[7] Beijing Ever Bright's name was improperly translated in the documents delivered, and the documents did not include a copy of the original complaint. Liu Cert. at ¶ 4.

5. *The Response of Beijing Ever Bright And The People's Republic of China To The Documents Delivered*

Beijing Ever Bright thus first learned of this lawsuit on or about March 20, 1989 when it received, via DHL courier, a copy of the summons and the amended answer and counterclaims. The documents received caused no small amount of confusion at Beijing Ever Bright: Beijing Ever Bright's name was incorrectly translated into Chinese, Beijing Ever Bright had not filed a lawsuit in connection with the transaction, Richmark had never advised Beijing Ever Bright that it was commencing a lawsuit against TFC, and no copy of the original complaint was included in the

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[7]Although TFC also requested the clerk of the court to send the documents by mail, *see* Norris Affidavit, ER 103, pp. 2-3 at ¶¶ 4-5, the record does not indicate that such service was succe sful.

documents. Liu Cert. at ¶ 4. Beijing Ever Bright's personnel did not understand how it could be subject to "counterclaims" since it had filed no claims against TFC. Furthermore, Beijing Ever Bright believed it had been the *victim* of a breach of contract, not the *perpetrator*, and had no direct dealings with TFC other than the single meeting among a Beijing Ever Bright representative, Richmark and TFC in Los Angeles.

Liu Yan–Sheng, Beijing Ever Bright's in-house counsel, approached the Ministry of Foreign Affairs of the People's Republic of China[8] about the matter. The Ministry of Foreign Affairs instructed Liu that under the circumstances it was improper for a Chinese entity such as Beijing Ever Bright to appear in a foreign court, since service had not been made in accordance with applicable Chinese law. Liu Cert. at ¶ 6, and Exhibit A; *see also* App. G. Accordingly, Liu did not respond to the attempted service. He did, however, determine to make efforts to obtain permission to travel to the United States to investigate and address the lawsuit, for he understood, generally, that the summons merited some response.

The domestic situation in the People's Republic of China and numerous serious diplomatic obstacles prevented Liu from obtaining a visa.[9] Thus, because of these

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[8]The Ministry of Foreign Affairs is a department of the government of the People's Republic of China; it is the Chinese government's functional equivalent of the United States Department of State.

[9]In April 1989, the Ministry of Foreign Affairs denied Liu's application because it determined that it would be improper for a Chinese entity to make an appearance in a foreign court where service did not comply with either Waifa No. 47 or Article 29 of the Consular Convention. Liu Cert. at ¶ 6, Exhibit A. Liu nevertheless persisted in attempting to get permission, and eventually the Foreign Ministry agreed to allow Liu to resubmit his application. Liu Cert. at ¶ 7.

Unfortunately, Liu's attempt to reapply for permission to travel to the United States was thwarted by the historic events associated with Tiananmen Square in Beijing during the period from May to late July

obstacles and the instructions of the Ministry of Foreign Affairs, Beijing Ever Bright did not serve and file a reply to TFC's claims against it. The district court meanwhile entered a default against Beijing Ever Bright on June 9, 1989.

6. *The Settlement Of The Other Claims And The Default Judgment Against Beijing Ever Bright*

TFC, Richmark, and the other parties to the litigation eventually stipulated to dismissal without prejudice of all the other claims, counterclaims, and third parties claims in the litigation in April 1990, and further agreed to allow TFC to move for default judgment against Beijing Ever Bright. On May 31, 1990, the district court granted TFC's motion for a default final judgment against Beijing Ever Bright (which motion was not served on Beijing Ever Bright in *any* manner), ordered judgment entered, and awarded damages of approximately $ 2.2 million on TFC's state law claims of breach of contract and civil conspiracy and fraud.[10]

1989. The record demonstrated -- and the district court acknowledged -- the resulting disruption of business activities and deterioration of communication and diplomatic relations between the United States and China. Liu Cert. at ¶ 12. The United States, for instance, imposed new exchange restrictions against the People's Republic of China which resulted in unusually long periods of time for the issuance of an exit permit by the Chinese government, and the denial of an ordinary business visa by the U.S. Consulate. *Id.*

[10]TFC's state and federal RICO claims were dismissed by the district court in an order filed July 19, 1989, finding that "TFC has failed to allege any predicate acts with sufficient particularity." Order, July 19, 1989, DCD 149 at 27. That order also dismissed the claims against Peacock for lack of personal jurisdiction. *Id.* at 14. Even though it had not yet entered an appearance, the district court specifically dismissed the federal and state RICO claims against Beijing Ever Bright in an order filed May 3, 1990. DCD 198.

7. *The Immediate Response Of Beijing Ever Bright To The Default Judgment*

Beijing Ever Bright knew nothing of the progress of the litigation from the time it received the initial improperly served summons in March 1989 until it received the notice of entry of default judgment against it, again delivered by DHL courier, in June 1990. Liu Cert. at ¶ 9. By the time the notice of judgment was received, the domestic situation in the People's Republic of China had settled significantly. Thus Beijing Ever Bright was able to, and in fact did, respond immediately. Moreover, this notice stated that a judgment had actually been entered, despite the defects in service of process under Chinese law. Accordingly, in an attempt to rectify this error, Beijing Ever Bright obtained United States counsel as soon as possible, and proceeded with both an appeal of the default judgment to the court of appeals and a motion for relief from the judgment in the district court.

The district court denied Beijing Ever Bright's motion for relief from the default judgment. App. B. The court determined that Beijing Ever Bright had meritorious defenses to TFC's claims and that TFC would not be prejudiced by such relief; nevertheless, the district court held that Beijing Ever Bright's initial failure to respond did not constitute "excusable neglect." *Id.* at B-11. The district court also rejected Beijing Ever Bright's contentions that it lacked personal jurisdiction[11] and that service was defective. *Id.* at B-8,9. Beijing Ever Bright then also appealed this order, and the court of appeals consolidated

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[11]The district court determined that it could properly exercise personal jurisdiction based on Beijing Ever Bright's contacts with the United States. App. B at B-8. Alternatively, the district court stated that personal jurisdiction was appropriate based on contacts with Oregon *and* California related to the transaction. *Id.* The district court made no determination, however, based on contacts with Oregon alone.

that appeal with Beijing Ever Bright's earlier appeal from the default judgment.

B. The Decision Of The Court Of Appeals

In its decision filed July 3, 1991, the court of appeals affirmed the district court's entry of default judgment and denial of relief from that judgment. Reviewing the district court's exercise of personal jurisdiction *de novo*, the court of appeals determined that the exercise of general jurisdiction over Beijing Ever Bright was appropriate under what it called the "traditional minimum contacts tests" because it found contacts establishing "a consistent pattern of conducting and soliciting business." App. A at A-8. The court of appeals' use of the "traditional" tests to find "substantial" or "continuous and systematic" contacts purported to rely upon this Court's analysis in *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408, 414-416 & 414 n. 9. (1984). *Id.* at A-7-8. However, the court of appeals' analysis of the contacts to support the finding of general jurisdiction departed from the only "traditional" tests enunciated by this Court. The court of appeals examined not only contacts between Beijing Ever Bright and Oregon, but also contacts outside the forum; the court of appeals determined that because service was purportedly made under the FSIA service provisions (*see* 28 U.S.C. § 1608), "'the relevant area in delineating contacts is the entire United States, not merely [the forum state].'" *Id.* at A-8 (citations omitted). Thus the court of appeals' determination combined three analytically distinct sets of contacts to find personal jurisdiction: (1) Beijing Ever Bright's contacts with Oregon; (2) Beijing Ever Bright's contacts in this transaction with the United States as a whole; and (3) contacts with the United States that have no

relation to either Oregon or to the transaction at issue.[12]

On the issue of whether service of process complied with the requirements of the FSIA, the court of appeals held that delivery of an answer and counterclaim in Beijing by DHL courier was effective service under 28 U.S.C. § 1608(b)(3)(B), even though such service did not comply with Chinese law. The court of appeals did note that TFC could resort to service under section 1608(b)(3) only if service could not be accomplished under the methods provided in sections 1608(b)(1) and (2). The court of appeals held, however, that the FSIA's requirement that service be made "in accordance with an *applicable international convention* on service of judicial documents," 28 U.S.C. § 1608(b)(2) (emphasis added), did not require TFC to follow the provisions of the Consular Convention. Thus, the court of appeals concluded that the Consular Convention was not an "applicable international convention on service of judicial documents." *Id.* at A-10-11.

Finally, the court of appeals affirmed the denial of Rule 60(b) relief from the default judgment. Despite the district court's finding of meritorious defenses and the absence of any prejudice to TFC, the court of appeals affirmed the finding that Beijing Ever Bright's failure to respond was the result of culpable conduct. *Id.* at A-11-13. The court of appeals held that Beijing Ever Bright's failure to appear was culpable conduct, despite its government's instruction not to appear in a United States court (because service of process was not accomplished according to its laws),

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[12]Because it found sufficient contacts with the United States to support general jurisdiction, the court of appeals declined to address questions of specific jurisdiction. *Id.* at A-8 n.2. Although the district court propounded an alternative basis for personal jurisdiction based on contacts with Oregon *and* California, it did not discuss the sufficiency of contacts with Oregon alone. App. B at B-8. As noted above, the record demonstrates that in fact there are not sufficient contacts with Oregon for the exercise either of general or specific jurisdiction, but no court below analyzed the sufficiency of the Oregon contacts by themselves.

because the government did not in so many words absolutely "forbid" the party from appearing. *Id.* at A-12.[13]

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS RAISES SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTIONS CONCERNING PERSONAL JURISDICTION AND DUE PROCESS, WHICH THIS COURT HAS TWICE NOTED BUT NOT YET BEEN REQUIRED TO DECIDE, AND OVER WHICH THE LOWER COURTS ARE DIVIDED

This Court has on several occasions revisited and clarified the appropriate application of the "minimum contacts" test for state court exercise of personal jurisdiction under the Due Process Clause of the Fourteenth Amendment. *See, e.g., Asahi Metal Industry v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1983); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). This Court has had significantly fewer occasions, however, to address the application of the presumably similar "minimum contacts" test for federal court exercise of personal jurisdiction under the Due Process Clause of the Fifth Amendment.

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[13] The court of appeals also based its finding in part on the misapprehension of fact that Beijing Ever Bright secured United States counsel on other matters during the same period. The record, ER 233 at ¶ 20-21, clearly discloses that it was a separate Chinese corporation that did so -- and the court of appeals thus erred by attributing actions of a separate juridical entity to Beijing Ever Bright. App. A at A-13.

The analysis utilized by the court of appeals here presents important questions concerning the limits on a federal court's exercise of personal jurisdiction under the Fifth Amendment, and, in this particular context, under the Foreign Sovereign Immunities Act. In affirming the exercise of personal jurisdiction by the district court over petitioner, the court of appeals applied a minimum contacts analysis under the Fifth Amendment Due Process Clause that has never been approved by this Court, and that is significantly different from the test mandated by this Court under the identical Due Process Clause found in the Fourteenth Amendment. As applied by the court of appeals here, that analysis does not comport with the requirements of due process, or with considerations of international comity.

A. Personal Jurisdiction Based On Aggregate National Contacts Violates The Due Process Clause Of The Fifth Amendment

In both *Asahi* and *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 102 n. 5 (1987), this Court noted, but did not have occasion to determine, the issue of whether

> Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

Asahi, 480 U.S. at 113 n. * (emphasis in original); *Omni*, 484 U.S. 102 n. 5.[14]

The constitutional issues raised by the national contacts test are squarely before the Court in this case. The provisions in the FSIA[15] for service of process upon an agency or instrumentality of a foreign state explicitly authorize service outside the territorial limits of the United States. *See* 28 U.S.C. § 1608. The FSIA provision for original federal district court jurisdiction authorizes personal jurisdiction "as to every claim for relief [where the FSIA immunities do not apply][16] where service has been made under section 1608... ." 28 U.S.C. § 1330(b).

Thus the question here is not whether Congress has authorized nationwide or worldwide service of process, for it clearly has, but rather whether such process can be utilized to obtain personal jurisdiction in these circumstances consistent with the due process requirements of the Fifth Amendment.[17] More specifically, the

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[14]*Asahi* involved the assertion of personal jurisdiction by a state court under a state long-arm statute. 480 U.S. at 102. In *Omni*, the constitutional issue was not before the Court because there was no federal statute specifically authorizing nationwide or worldwide service of process. 484 U.S. at 98.

[15]This Court has previously held that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state." *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428, 434 (1988).

[16]This case falls under the "commercial activity" exception to foreign sovereign immunity under 28 U.S.C. § 1605(a)(2). *See* App. A at A-7 n.1.

[17]Accordingly, petitioner's challenge is not to the constitutionality of 28 U.S.C. §§ 1330 or 1608 as such, but rather to their application here ostensibly to obtain personal jurisdiction over petitioner based on an aggregate of national contacts, rather than on contacts with the forum state in which the district court asserting that jurisdiction sits. Such a challenge does not implicate the notice provisions of 28 U.S.C. § 2403(a), and the court of appeals did not certify any such challenge to the Attorney General. *Cf.* Supreme Court Rule 29.4(b). As a matter of courtesy -- and an abundance of caution -- however, petitioner has served copies of this petition on the Solicitor General.

question is whether personal jurisdiction obtained through such service is valid if based on an aggregate of national contacts, rather than on contacts with the State in which the federal court sits.[18] The court of appeals held that it was. A review of the theoretical underpinnings of the national contacts test reveals, however, that it is based on assumptions about personal jurisdiction that this Court has rejected. The national contacts test must also be rejected because of the constitutional quandaries that would result from application of two different minimum contacts tests, and therefore two different levels of protection of individual liberty, under the same Fifth Amendment Due Process Clause.

The national contacts approach was first noted before the enactment of the FSIA in federal question cases where Congress had authorized nationwide or worldwide service of process. Federal courts which have adopted the national contacts test have applied it in cases arising, for instance, under federal securities laws,[19] antitrust,[20] and

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[18]The legislative history of the FSIA is not entirely clear as to whether Congress anticipated that the assertion of personal jurisdiction through the nationwide and worldwide service it was authorizing would be appropriately utilized when based only on aggregate contacts with the United States. The House Report on the FSIA initially refers to this Court's traditional test of contacts with the forum state enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), but goes on to note that the necessary contacts for personal jurisdiction are prescribed by the immunity provisions, and that "each of the immunity provisions requires some connection between the lawsuit and the United States." House Judicial Committee, *Jurisdiction of United States Court in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. *reprinted in* 1976 U.S. Code Cong. & Admin. News 6605 at 6612.

[19]*See Leasco Data Processing Corp. v. Maxwell*,468 F.2d 1326 (2d Cir. 1972), *Securities Investor Corp. v. Vigman*, 764 F2d. 1309 (9th Cir. 1985).

[20]*See Go-Video, Inc. v. Akai Electric Co., Ltd.*, 885 F.2d 1406, 1413 (9th Circ. 1989); *Newport Components v. NEC Home Electronics*, 671 F. Supp. 1525, 1537-38 (C.D. Cal. 1987).

RICO.[21] Use of national contacts in FSIA personal jurisdiction analysis was first adopted by the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313-315 (2d Cir. 1981), *cert denied*, 454 U.S. 1148 (1982).[22]

The Fifth Circuit expounded the rationale for broadening the scope of contacts analyzed for personal jurisdiction in federal question cases with nationwide or worldwide service of process provisions in *Federal Trade Commission v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. Unit A 1981). According to *Jim Walter*, the variation in the national contacts test reflects the fact that the federal rather than a state sovereign exercises its power in a federal question case.

> The [minimum contacts] doctrine arises out of the limitations inherent in concepts of sovereignty. In enacting and enforcing laws, each state exercises a sovereign function. The sovereignty may be exercised only over those who reside in the state and those who undertake activities within it . . . [T]he doctrine establishes when a defendant may fairly be thought to have submitted itself to that limited sovereignty.

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[21] *American Trade Partners v. A-1 Int'l Importing*, 755 F. Supp. 1292, 1302 and n.14 (E.D. Pa. 1990); *Anchor Glass Container Corp. v. Stand Energy Corp.*, 711 F. Supp. 325, 330 and n.10 (S.D. Miss 1989).

[22] The Ninth Circuit first adopted the national contacts test for FSIA cases in *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied* 484 U.S. 976 (1987), and applied it a second time in *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir.), *cert. denied*, __ U.S. __, 110 S. Ct. 237 (1989). In each case the Ninth Circuit relied upon *Texas Trading*. *See* App. A at A-8.

Jim Walter, 651 F.2d at 256 (citations and footnotes omitted). *Jim Walter*'s rationale was thus that the "judicial power of the United States," which each federal court exercises pursuant to Article III, is potentially "coextensive with the boundaries of the United States; and that therefore due process requires only that a defendant in a federal suit have minimum contacts with the United States, 'the sovereign that has created the court.'" *Id.; see also Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) ("The question is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant. ... A federal court in a federal question case... exercises the power of the United States.")

In *Insurance Corp. of Ireland, Ltd. v. Campagnie des Bauxites*, 456 U.S. 694, 702-03 (1982), however, this Court stated that the personal jurisdiction requirement "represents first of all an individual right."

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.

Id. at 702-03 (footnote omitted).

This Court's decision in *Ireland* has lead several courts to reassess the requirements of personal jurisdiction in federal cases with nationwide or worldwide service of process. *See Duckworth v. Medical Electro-Therapeutics, Inc.*, 768 F. Supp. 822, 828 (S.D. Ga. 1991) (discussion of development and current status of national contacts test). Some courts have explicitly rejected the national contacts test, returning to an analysis of minimum contacts with the state in which the federal court sits, even in federal

question cases with nationwide or worldwide service of process.[23] Both the Fifth and Eleventh Circuits have noted the erosion of the rationale for the national contacts test in light of *Ireland*, but have not decided what alternative approach is appropriate. *See In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1344, n. 8 (11th Cir. 1988), *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Burstein v. State Bar of California*, 593 F.2d 511, 515-16 (5th Cir. 1982).

As this and other cases demonstrate, however, the Ninth Circuit has not shifted from its adherence to the national contacts test in light of *Ireland*. *See Go-Video*, 885 F.2d at 1413. This confusion among the circuits and other lower federal courts over the continued validity of the national contacts test in light of *Ireland* is a compelling reason for this Court to grant this writ and address the constitutional questions here.

A second compelling reason for granting this writ and reviewing the constitutionality of the national contacts test is to address the constitutional quandary that results from applying two different minimum contacts tests under the same Due Process Clause of the Fifth Amendment. The root of this problem with the national contacts test lies in the fact that there are different sources for federal court jurisdiction. In any particular case, subject matter jurisdiction of a federal court may be based on federal questions, admiralty, bankruptcy, diversity of citizenship, foreign sovereignty, principles of pendant or ancillary jurisdiction, or a combination of the foregoing. *See generally* 28 U.S.C. 1330-1334. Moreover, the provisions for

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[23] *See Cannon v. Gardner-Martin Asphalt Corp. Ret. Trust-Profit Sharing Plan*, 699 F. Supp. 265, 267-68 (M.D. Fla. 1988); *Wichita Federal Savings & Loan Assn. v. Landmark Group, Inc.*, 657 F. Supp. 1182, 1194 (D. Kan. 1987); *GRM v. Equine Invest. and Management Group*, 596 F. Supp. 307, 314-15 (S.D. Tex. 1984); *Bamford v. Hobbs*, 569 F. Supp. 160, 166 (S.D. Tex. 1983).

service of process which may apply in federal court cases can vary from state to state, and federal statute to federal statute; some federal statutes have their own service provisions, others require service in accordance with state rules. *See generally* Fed. R. Civ. P. 4(e). It is settled law that in a diversity case, a federal court applies the traditional test and looks to contacts between the defendant and the forum state in which the federal court sits.[24] The traditional test of contacts with the state is also applied in federal question and admiralty cases if there is no federal statute authorizing nationwide or worldwide service of process. *See Omni, supra; see also Max Daetweiler Corp. v. R. Meyer*, 762 F.2d 290, 295 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985) (patent case).[25] In these cases, therefore, the Fifth Amendment minimum contacts test is precisely the same as the Fourteenth Amendment test set forth in *International Shoe*. Yet some courts have held that a particular combination of subject matter jurisdiction and service of process authorization creates a different personal jurisdiction analysis under the Fifth Amendment and allows a federal court to look at "nationwide" contacts rather than the forum state contacts to which it is restricted in all other cases. This is an anomaly of constitutional significance; it advocates a different, reduced level of protection of the individual

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[24] *See Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1154 (6th Cir. 1990) (national contacts test must be rejected in diversity case, which as such does not involve a federal statute with a national service provision.)

[25] *See also United Rope Distributors v. Seatriumph Marine*, 930 F.2d. 532, 535 (7th Cir. 1991) (admiralty; where no federal statute authorizes service, court must restrict contacts analysis to forum state.)

In a case that arose prior to the enactment of the FSIA and its attendant worldwide service provisions, the Ninth Circuit applied the traditional test to a foreign sovereign, and found personal jurisdiction lacking because of insufficient contacts with the state in which the federal court sat. *Gonzalez v. Consejo Nacional de Producion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980).

liberty interests under the Due Process Clause of the Fifth Amendment, depending not on the Constitution, but on the nature of the cause of action and the type of service statutorily authorized.

The anomaly is amplified in cases where, for instance, there is more than one basis for federal subject matter jurisdiction, or there is a combination of federal and state law causes of action, or there are multiple defendants. For example, a plaintiff may be able to assert a state law cause of action against a nonresident defendant that is not otherwise subject to the state's long-arm jurisdiction by adding a questionable federal cause of action that has a nationwide or worldwide service provision.

The potential for a shifting level of protection under the Fifth Amendment in the same case is not merely speculative or hypothetical. TFC's third party claims asserted the same or nearly identical causes of action under Oregon law against both Beijing Ever Bright and Peacock Mfg., a Texas corporation affiliated with the original plaintiff, Richmark.[26] Although the counts asserted against Beijing Ever Bright and Peacock were the same or nearly identical, the bases for federal subject matter jurisdiction over the two parties were different: FSIA and diversity, respectively. As a result of this difference, the district court looked to Peacock's contacts with Oregon and found personal jurisdiction lacking, Opinion, July 19, 1989, DCD 149 at 14, but looked to Beijing Ever Bright's contacts *with the entire United States*, and found personal jurisdiction authorized.

The point here is not whether the factual situations concerning the two defendants were absolutely identical, but rather whether the jurisdictional facts concerning each of them were analyzed under the same test. If the Fifth Amendment's due process limitations on the assertion of

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[26]As noted *supra* at n. 10, the third party claims originally included federal RICO violations, but those were dismissed by the district court.

personal jurisdiction by a federal court are a protection of individual liberty interests, then two defendants in the same federal action, against whom the same claims are asserted, should be entitled to the same level of protection of those individual liberty interests.

B. Personal Jurisdiction Based On Aggregate National Contacts Violates The Due Process Clause Of The Fifth Amendment Where The Cause Of Action Asserted Is Based On State Law

Even if the Fifth Amendment Due Process Clause may in some circumstances allow the assertion of personal jurisdiction based on the aggregation of national contacts, application of the national contacts test in this case and similar cases arising under the FSIA violates due process. In other cases approving the use of the national contacts test in federal courts, the courts have noted that the two prerequisites to the use of the test are (1) a federal statute authorizing nationwide or worldwide service of process, and (2) a *federal* cause of action.[27] The causes of action asserted against Beijing Ever Bright on which the default judgment is based were not federal causes of action, but were rather claims asserted under Oregon law.[28]

Thus, even if the national contacts test may be permissible, this case is distinguishable from the securities, RICO, and antitrust law cases which involve federal causes of action. The FSIA does not create substantive liability. Section 1606 of the FSIA provides, in relevant part, that "as to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a

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[27] *See, e.g., Duckworth, supra,* 768 F.Supp. at 830 ("new" national contacts test should be applied to *federal question* cases).

[28] *See* n.10 *supra.*

private individual under like circumstances . . ." Quoting this language, this Court noted that the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality . . ." *First National City Bank v. Banco Para el Commercio,* 462 U.S. 611, 620 (1982).

The application of a national contacts test to Beijing Ever Bright thus violates section 1606's requirement that it be liable "in the same manner and to the same extent as a private individual under like circumstances." The district court's dismissal of the claims against Peacock for lack of personal jurisdiction based on insufficient contacts with *Oregon* demonstrates that applying the *national* contacts test to Beijing Ever Bright does not treat Beijing Ever Bright "in the same manner and to the same extent."

This contention -- that federal courts cannot consider national contacts for personal jurisdiction over an FSIA defendant charged with violations of state law -- is supported by this Court's analysis of the other "fundamental fairness" considerations that are a part of the due process limitation on personal jurisdiction. One part of the equation established by this Court, and frequently cited by advocates of the national contacts analysis, is consideration of the interests of the *forum. Asahi, supra,* at 113. If all of the claims asserted against an FSIA defendant are state law claims, then the forum with the interest in having those claims adjudicated is that *state,* for that state supplies the substantive law of liability. Even if notions of sovereignty are reinjected into the consideration of the due process limits on personal jurisdiction, the use of the national contacts test violates due process where, as here, the sovereign supplying the substantive law of liability is the state, not the national government.[29]

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[29]Expanding the "forum" to include contacts with the entire United States under the FSIA would result in an additional constitutional anomaly. State courts have the power to adjudicate claims against FSIA

II. THE COURT OF APPEALS' NARROW READING OF "APPLICABLE INTERNATIONAL CONVENTION" DOES NOT FOLLOW THE INTENT OF THE FSIA AND DISRUPTS SETTLED INTERNATIONAL AGREEMENTS

The FSIA provides for service: (1) pursuant to any special arrangement between the parties; (2) in the absence of such an arrangement, by service upon an authorized agent in the United States or pursuant to an applicable international convention; or (3) if service cannot be made pursuant to (1) or (2), by delivery of a copy and a translation of the summons and complaint either as directed in response to a letter rogatory, by mail sent by the clerk of the court, or as directed by order of the court. 28 U.S.C. § 1608(b). Delivery of improperly translated documents by DHL courier in a manner not in conformity with Chinese law or the agreement between China and the United States then in force is not effective under any of these provisions. Validation of such service by the court of appeals disturbs the international comity balance struck by Congress in the service requirements of the FSIA, and has wide-ranging reverberations which merit this Court's review.

Without question, if the Consular Convention Between the United States and the People's Republic of China (App. E) is an "applicable international convention" under section 1608(b)(2), TFC was required to proceed according to its terms. TFC could have, but did not, attempt to serve process through the diplomatic channels for service

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defendants as well, since federal district court jurisdiction is original but not exclusive. *See* 28 U.S.C. § 1330. Even in state court actions, however, the worldwide service provisions of Section 1608 apply. Therefore, under the analysis that supports national contacts in FSIA cases, a state court adjudicating a state law cause of action may conclude that it is justified in using national contacts to assert personal jurisdiction over the FSIA defendant.

established in the Consular Convention. *See supra* at 6-8. TFC thus failed to satisfy section 1608(b)(2), and since the service methods provided in section 1608(b)(3) are available only "if service *cannot* be made under paragraphs (1) and (2)," that should have been the end of the matter.

The court of appeals, however, undertook an overly narrow interpretation of section 1608(b)(2) to reach its conclusion that the Consular Convention was not "an applicable international convention on service of judicial documents." Its decision in this case appears to be the first time a federal court has construed the FSIA's requirement of adherence to an "applicable international convention." This interpretation has far-reaching implications for future cases under the FSIA and for relations with foreign states.

The court of appeals' conclusion is based on its observation that the "focus" of the Consular Convention is not limited to service of judicial documents, and that the legislative history of the FSIA mentioned only The Hague Convention as an example of "an applicable international convention." Appendix A at A-11. In so holding, the court of appeals ignored other more compelling considerations which demonstrate that the Consular Convention falls squarely within the contemplation of section 1608(b)(2).

Although the legislative history of the FSIA may indicate in one instance that The Hague Convention was the only "applicable international agreement" in force at the time, the Consular Convention was executed *after* the enactment of the FSIA. The House report on the FSIA states in a different portion of the discussion that The Hague Convention is merely "*such* an applicable international convention," obviously contemplating the future existence of others; "if a country has entered into *such* an international convention, priority should be given to this method of service." H.R. Rep. 94-1487 at 11 (emphasis added). Moreover, service through diplomatic channels, such as those established by the Consular Convention, "is widely used in international practice" and

"*indeed preferred by the United States* in suits brought against the United States government in foreign courts." *Id.* at 25 (emphasis added) (citations omitted). Thus, both the legislative history and the construction by the parties favoring service through diplomatic channels compels the conclusion that the Consular Convention is an "applicable international convention" under the FSIA.[30]

The analysis used by the court of appeals has implications that reach far beyond this case, and even beyond relations with the People's Republic of China. Provisions enabling service through diplomatic channels appear in numerous consular conventions between the United States and other countries -- including several with countries which are not also signatories to The Hague Convention.[31] (Excerpts of some of these consular conventions between the United States and other countries which have not signed The Hague Convention appear at Appendix I.) This Court has held that the FSIA is the *sole* basis for obtaining jurisdiction over a foreign state. *Amerada Hess*, 488 U.S. at 434. The court of appeals'

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[30]In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1987), this Court noted that to ascertain the meaning of agreements or treaties with foreign states, the Court "... may look beyond the written words to the history of the treaty, the negotiations, and *the practical construction adopted by the parties.*" *Id.* at 700 (emphasis added) (citations omitted). The Consular Convention provides a method of service through diplomatic channels. That this was understood by the parties as the required method for service of process is reinforced by the "practical construction" applied by the People's Republic of China in this case: when Beijing Ever Bright's in-house counsel brought this matter to the attention of the Ministry of Foreign Affairs, the Ministry's interpretation was unequivocal: service had to made in accordance with Article 29 of the Consular Convention and with Waifa No. 47.

[31]The People's Republic of China has since become a signatory to The Hague Convention, doing so on March 2, 1991, but stating its reservations under Article 10 that it objects to and will not accept any of the methods in that Article which allow a party to bypass diplomatic channels. *See* App. H at H-4.

determination that these conventions are not "applicable international agreements" under the FSIA renders the service provisions in all such consular conventions without the force of law that the FSIA intended, and that foreign states presumably have expected their citizens and sovereign instrumentalities to be able to rely upon. To prevent such a widespread detrimental effect on agreements and relations with other countries, the court of appeals' decision should be reviewed by this Court.

III. THE COURT OF APPEALS' RIGID VIEW OF THE "CULPABLE CONDUCT" STANDARD IS AT ODDS WITH THE POLICIES OF THE FSIA AND THE VIEWS OF OTHER CIRCUITS

The court of appeals was faced with four sets of factors that should have guided its analysis of whether there was any "culpable conduct" in Beijing Ever Bright's failure to respond: (1) the confusion and misunderstanding naturally caused by the numerous flaws in the substance and manner of service of the documents delivered to Beijing Ever Bright; (2) the official reaction of the Ministry of Foreign Affairs of the People's Republic of China that a response to TFC's claims was unnecessary and inappropriate because of TFC's failure to abide by Chinese law or the Consular Convention; (3) Liu's efforts, tempered by his government's official reaction, nonetheless to obtain permission to investigate and, if necessary, respond to the lawsuit, coupled with the thwarting of those efforts by forces well beyond Liu's or Beijing Ever Bright's control; and (4) Beijing Ever Bright's immediate response when it received notice that a final judgment of default had been entered despite what it considered to be defective service.

Beijing Ever Bright was entitled to relief from the default judgment because its initial failure to respond to the inadequate "service" under these circumstances was, at

most, excusable neglect. Default judgments should be vacated when they are "a result of 'a broad divergence in [the two countries'] cultural, governmental, and political approaches to the present case.'" *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551 (D.C. Cir. 1987) (quoting district court's opinion).[32]

The crux of the legal error on this issue emerges from the court of appeals' shifting and inconsistent consideration of such international principles. The error in the court of appeal's analysis is evident in comparing this case and *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987), to *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, __ U.S. __, 110 S. Ct. 237 (1989). Foreign sovereigns, and FSIA defendants following the lead of their respective governments, are not "culpable" when acting, prior to a contrary ruling from a United States court, consistently with their notion of what the law requires. *Gregorian*, 871 F.2d at 1525. Thus, the Fifth Circuit has "reject[ed] out of hand the contention that in seeking an adjudication of jurisdictional issues arising out of United States domestic law China acts improperly in reserving what it conceives are its rights under international law." *Jackson v. People's Republic of China*, 794 F.2d 1490, 1496-97 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).[33]

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[32]"When a defendant foreign state has appeared and asserts legal defenses, albeit after a default judgment has been entered, it is important that those defenses be considered carefully, and if possible, that the dispute be resolved on the basis of all relevant legal arguments.'" *Practical Concepts*, 811 F.2d at 1552, and *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 175 (5th Cir. 1989) (both quoting Brief for the United States as *Amicus Curiae* at 3-4). *See also Gregorian*, 871 F.2d 1515; *Jackson v. People's Republic of China*, 794 F.2d 1490, 1495 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).

[33]This principle must be applied in accord with the "strong policy" behind the FSIA "of encouraging foreign states and their instrumentalities to appear before United States courts and allowing the

In particular, courts must recognize that the control exercised by foreign governments over entities that are their "instrumentalities" within the meaning of the FSIA may be, and indeed generally is, manifested in ways that are subtle, complex and unique to the culture of the country involved.

The court of appeals relied on the fact that the Chinese government did not explicitly *order* Beijing Ever Bright to refrain from making an appearance, and that Beijing Ever Bright did not demonstrate an inability to communicate with the court through "other channels," Appendix A at A–13, in seeking to distinguish this case from *Gregorian*. That the court of appeals did so demonstrates that its analysis concerning defaults under the FSIA is at odds with the analysis of the Fifth Circuit in *Jackson*. It is also wholly inconsistent with the Congressional intent embodied in the FSIA and the strong judicial policy of applying a liberal standard in vacating default judgments against foreign governments who eventually do appear in court to defend themselves. Whether Beijing Ever Bright *could have* used other channels to respond should not have overridden the Chinese government's official determination that a response was unnecessary and inappropriate. The FSIA embodies comity and public policy considerations which compel a measure of respect for a position taken in good faith by a foreign state concerning its amenability to suit in the United States, at least in the absence of a determination by a United States court. *Jackson*, 794 F.2d at 1496-97. Those considerations should be equally applicable regardless of the particularities of the form of the foreign government's actions. Because of the undue limitation in the court of appeals' analysis, and because of

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merits of cases involving foreign sovereigns to be considered completely and carefully." *Amernational Industries, Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 976 (6th Cir.), *cert. denied*, __ U.S. __, 111 S. Ct. 2857 (1991).

the different approaches taken by the various circuits in analyzing "culpable conduct" of a foreign state, this Court should grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 13, 1992.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHMARK CORPORATION,
a California corporation,
Plaintiff-counter-claim-defendant,
v.
TIMBER FALLING CONSULTANTS, INC.,
an Oregon corporation,
Defendant-counter-3rd-party plaintiff-Appellee,
v.
PEACOCK MANUFACTURING COMPANY, INC.,
a Texas corporation,
ZHU YUANCHANG; EUGENE WANG; JAMES YANG; FRANCIS TONG,
Third-party-defendants,
and
BEIJING EVER BRIGHT INDUSTRIAL COMPANY,
a foreign corporation,
Third-party-defendant-Appellant.

Nos. 90-35549, 90-35894, and 91-35280

D.C. No. CV-88-1203-HJF

OPINION

Appeal from the United States District Court for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
May 16, 1991—Portland, Oregon

Filed July 3, 1991

Before: Harry Pregerson, Melvin Brunetti and Thomas G. Nelson, Circuit Judges.

8309

SUMMARY

Courts and Procedure

Affirming a district court entry of default judgment, the court of appeals held that the district court properly refused to set aside the judgment because the culpable conduct of the appellant in not answering the complaing led to the default.

Appellant Beijing Ever Bright Industrial Company (BEB) a corporation in the People's Republic of China, entered into a contract with a California corporation for the purchase of timber. When a subcontractor failed to deliver the timber, the California corporation defaulted on its contract with BEB. The California corporation sued the subcontractor who, in turn, asserted counterclaims against the corporation and BEB. Although BEB acknowledged that it received the third-party complaint via DHL Courier in Beijing and understood the consequences of failing to respond with a responsive pleading, it failed to contact the court or the complainant until five days after the district court had entered default judgment against it. BEB argued that its efforts to respond were hampered by the Chinese government and the chaos caused by the Tiananmen Square Incident. The district court denied relief under Fed. R. Civ. P. 60(b), holding that personal jurisdiction over BEB existed and that its failure to appear was the result of culpable conduct.

[1] Personal jurisdiction under the Foreign Sovereign Immunities Act (FSIA) is determined by resorting to the traditional minimum contacts tests. A court may assert general personal jurisdiction if a non-resident defendant has substantial or continuous and systematic contacts with the forum state. Where service is made under FSIA

section 1608, the relevant area is the entire United States, not merely the forum state. [2] The contract between the parties, the agreed pick up of timber at a U.S. port, BEB's dispatch of a ship to get substitute timber, and other export and business transactions in this country established a consistent pattern of conducting and soliciting business in the United States that certainly could be characterized as substantial. Therefore, the district court had personal jurisdiction over BEB.

[3] BEB was served under section 1608(b)(3)(B). However, it argued that service of process on Chinese entities should have been made under section 1608(b)(3)(A), which requires a letter rogatory. However, the express language of section 1608B(b)(3) authorizes service under subsection (A) or (B) or (C). [4] However, section 1608(b)(3) applied only if service could not be made under (b)(1) or (2). [5] BEB's contention that the Consular Convention between the United States and the People's Republic of China is an applicable international convention on service of judicial documents, and that service could have been made under paragraph (2), was incorrect. The convention governed the privileges, activities, and immunities of consulates and their officers and should not be construed as a "convention on service of judicial documents."

[6] In support of its argument that its conduct was not culpable for Rule 60(b) purposes, BEB cited *Gregorian v. Izvestia*. [7] However, the present case was distinguishable from *Gregorian* in that BEB did not allege that the People's Republic of China instructed it to refrain from entering an appearance. Rather, BEB simply alleged that its country refused to issue it an exit visa. BEB did not explain why it could not have communicated with the court through other channels. In addition, evidence was presented that BEB secured local counsel in the United States during that period to address other matters. In light of this evidence, the district court did not abuse its discretion.

[8] The court agreed with the Eleventh Circuit that prejudment and postjudgment orders compelling

discovery, as the judgment debtor examination granted here against BEB, are not considered final judgments and may be appealed only after the issuance of a contempt order for failure to comply. [9] Because the district court has not found BEB in contempt or the order granting a judgment debtor examination, the appellate court lacked jurisdiction to review the appeal on this issue.

COUNSEL

John F. Neupert, Miller, Nash, Wiener, Hager & Carlsen, Portland, Oregon, for Timber Falling Consultants, Inc., and Oregon corporation.

David A. Ranheim, Dorsey & Whitney, Minneapolis, Minnesota, for Beijing Ever Bright Industrial Company, a foreign corporation.

OPINION

PREGERSON, Circuit Judge:

Third-Party Defendant-Appellant Beijing Ever Bright (BEB), a corporation of the People's Republic of China, appeals the district court's entry of default judgment, denial of BEB's Rule 60(b) motion to set aside the default judgment, and order granting a judgment debtor examination. We affirm.

BACKGROUND

BEB, a corporation organized under the laws of the People's Republic of China, is a subsidiary of China Everbright Holdings Co. Ltd., a Hong Kong corporation. In early 1988, BEB entered into a contract with Richmark Corporation (Richmark), a California corporation, to purchase timber. Richmark subcontracted with Timber Falling Consultants, Inc. (Timber Falling), an Oregon corporation, to procure the timber.

Subsequently, Timber Falling failed to deliver the timber. As a result, Richmark defaulted on its contract

with BEB. Richmark brought a contract action against Timber Falling for damages.

Timber Falling filed counterclaims against Richmark and BEB (as third-party defendant) for breach of contract, fraud and civil conspiracy, and tortious interference. Timber Falling alleges in its counterclaim: (1) BEB dispatched a ship for the timber without notifying Timber Falling and before Timber Falling's contract required delivery; (2) BEB and Richmark plotted to extract contract concessions from Timber Falling; and (3) Richmark wrongfully repudiated its contract with Timber Falling.

On June 5, 1990, the district court entered a default judgment on the contract, fraud, and civil conspiracy claims against BEB and dismissed the tortious interference claim. The district court found that Timber Falling submitted evidence justifying an award of $2.2 million to compensate for lost profits, pre-judment interest, and out-of-pocket expenses.

BEB acknowledges that, in the Spring of 1989, it received the third-party complaint via DHL Courier in Beijing and understood the consequences of failing to respond with an answer or other pleading. Yet BEB failed to contact the court or Timber Failling until June 10, 1990 — five days after the default judgment was entered. BEB contends that its efforts to respond were hampered by the Chinese government and the chaos caused by the Tiananmen Square Incident.

BEB appealed the judgment and filed a Fed. R. Civ. P. 60(b) motion to set aside the default judgment. On October 15, 1990, the district court denied the Rule 60(b) motion finding that (1) subject matter jurisdiction existed because BEB is an agency or instrumentality of the PRC as

defined by the Foreign Sovereign Immunities Act (FSIA);[1] (2) BEB has sufficient contacts with the United States to establish personal jurisdiction; and (3) BEB's failure to appear was the result of culpable conduct, BEB appeals the denial of its Rule 60(b) motion.

On January 11, 1991, the district court granted Timber Falling's motion for a judgment debtor examination. BEB timely appeals this order.

DISCUSSION

On appeal, BEB contends the district court erred because (1) it lacked personal jurisdiction under the FSIA, (2) service of process under FSIA was improper, (3) BEB's failure to respond to Third-Party Plaintiff-Appellee Timber Falling's counterclaim did not constitute culpable conduct, and (4) the order granting a judgment debtor examination is overbroad. Finally, Timber Falling moved this court to dismiss BEB's judgment debtor examination appeal for lack of ripeness.

I. Personal Jurisdiction

[1] Whether personal jurisdiction exists is reviewed de novo where the underlying facts are undisputed. *Brainerd v. Governors of the Univ. of Alberta,* 873 F.2d 1257, 1258 (9th Cir. 1989). Personal jurisdiction under the FSIA is determined by resorting to the traditional minimum contacts tests. *Gregorian v. Izvestia,* 871 F.2d 1515, 1529 (9th Cir.), *cert. denied,* 110 S. Ct. 237 (1989). A court may assert general personal jurisdiction if a non-resident

[1] The FSIA creates subject matter jurisdiction in certain instances over claims brought against foreign sovereigns by creating statutory exceptions to sovereign immunity." *Gregorian v. Izvestia,* 871 F.2d 1515, 1520 (9th Cir.), *cert. denied,* 110 St. Ct. 237 (1989). As an "agency or instrumentality" of the People's Republic of China, BEB is treated as a foreign state under the FSIA. *See* 28 U.S.C. § 1603(a). At oral argument, BEB confirmed that it does not contest the district court's finding that is is an agency or instrumentality of the People's Republic of China. In this case, subject matter jurisdiction exists under the "commercial activity" exception to foreign sovereign immunity. *See* 28 U.S.C. § 1605(a)(2).

defendant has "substantial" or "continous and systematic" contacts with the forum state. *Heliocopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414-16 & 414 n.9 (1984).[2] "[W]here service is made under FSIA section 1608, 'the relevant area in delineating contacts is the entire United States, not merely [the forum state].'" *Meadows v. Dominican Republic,* 817 F.2d 517, 523 (9th Cir.) (quoting *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982)), *cert. denied,* 484 U.S. 976 (1987).

Here, BEB entered into a contract with Richmark, a California corporation for twelve shiploads of timber valued at $24,3000,000. The contract terms called for BEB to pick up each load of timber at a U.S. port. Payments were to be made in U.S. currency. BEB sent a ship to Oregon to pick up those logs. Finally, BEB sent a representative to Los Angeles to meet with Richmark and Timber Falling about the undelivered timber.

[2] Moreover, BEB does not dispute the following factual allegations: BEB dispatched a ship to California and Oregon to obtain substitute logs after Timber Falling failed to deliver; BEB's representative inspected and took title to the logs in Oregon; BEB negotiated other export transactions with a California export company; BEB transferred millions of dollars to a New York corporation during 1988-89; and BEB funded the purchase of a controlling interest in Mesta Engineering, a Pennsylvania corporation. These contacts establish a consistent pattern of conducting and soliciting business in the United States that certainly may be characterized as substantial. Therefore, we affirm the district court's finding of personal jurisdiction.

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[2] Because we find the BEB has sufficient contacts with the United States to support the exercise of "general" jurisdiction, there is not need to address Timber Falling's argument that the exercise of "specific" jurisdiction is also proper.

II. Service of Process

BEB contends that Timber Falling failed to properly effect service of process pursuant to 28 U.S.C. § 1608(b). Section 1608(b) provides:

> Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:
>
> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint . . . in accordance with an applicable international convention on service of judicial documents; or
>
> (3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery or a copy of the summons and complaint, together with a translation of each into the official language of the foreign state —
>
> (A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or
>
> (B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served or
>
> (C) as directed by order of the court consistent with the law of the place where service is to be made.

28 U.S.C. § 1608(b).

[3] Timber Falling contends that it satisfied the requirements of § 1608(b)(3)(B) by serving BEB via DHL Worldwide Express courier (DHL), which provided a return receipt. BEB acknowledges receipt of the summons

and counterclaim in Beijing, but argues that service of process on Chinese entities should be made pursuant to § 1608(b)(3)(A), which requires a letter rogatory. This contention in not convincing for two reasons. First, it is based on information outside the record allegedly obtained from the United States Department. Second, the express language of § 1608(b)(3) provides that Timber Falling may effect service under subsections (A) *or* (B) *or* (C).

[4] Finding that Timber Falling satisfied § 1608(b)(3)(B), however, does not end the analysis. Section 1608(b)(3) applies only "[i]f service cannot be made under paragraphs [1608(b)](1) or (2)." Section 1608(b)(2) allows service "in accordance with an applicable international convention *on service of judicial documents.*" BEB asserts that the Consular Convention Between the United States and the People's Republic of China (Consular Convention) is "an applicable international convention on service of judicial documents," and thus that service could have been made under paragraph (2).

Article 29 of the Consular Convention, the only article out of forty-two articles in the convention to address service of process, provides:

> A consular officer shall be entitled to serve judicial and other legal documents in accordance with international agreements in force between the sending and receiving States or, in absence of such agreements, to the extent permitted by the law of the receiving state.[3]

The Consular Convention between the United States and the People's Republic of China, Feb. 19, 1982, art. 29, 33 U.S.T. 2973, 2998, T.I.A.S. No. 10209.

[5] BEB's contention is incorrect. The Consular Convention is not an "applicable international convention *on service of judicial documents*" under § 1608(b)(2). Rather, the convention governs the privileges, activities, and immunities of consulates and their officers. The fact that one of forty-two articles (Article 29) in the convention allows consular officials to serve legal documents does not

convert the focus of the convention to service of judicial documents.

This conclusion is supported by the legislative history of the FSIA. The House Report to the FSIA notes that "[t]he *only such convention* [on service of judicial documents] to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969)." H.R. Rep No. 1487, 94th Cong. 2nd Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6623 (emphasis added). When the House Report was prepared, at least one other consular convention allowing service of process by consular officials — the Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (effective in the United States in 1969) — was in effect. *See* 1 Restatement (Third) of the Foreign Relations Law of the United States § 471 n.2 (1987) ("[a]rticle 5(j) of the [Vienna Convention] lists transmission of [legal] documents as a permissible consular function"). Nonetheless, the House Report did not consider the Vienna Convention to be an "applicable international convention on service of judicial documents" under § 1608. Thus, although the Consular Convention between the United States and the PRC was not in effect when the House Report was prepared, it likewise should not be construed as a "convention on service of judicial documents" under § 1608(b)(2). *See* Dellapenna, *Suing Foreign Governments and Their Corporations,* § 4.3, at 114 (1988) ("[a]t present the United States has ratified only one convention relating to service of process abroad — the Hague Convention"). Service of process therefore was proper under § 1608(b)(3)(B).

III. Culpable Conduct

BEB contends that the district court erred by not granting BEB's motion to set aside default judgment under Fed. R. Civ. P. 60(b). A district court's decision on a Rule 60(b) motion is reviewed for abuse of discretion. *Thompson v. Housing Auth. of Los Angeles,* 782 F.2d 829,

832 (9th Cir.), *cert. denied,* 479U.S. 829 (1986). This court has set forth three factors to consider in Rule 60(b) motions: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk v. Allen,* 739 F.2d 461, 463 (9th Cir. 1984). BEB contests the district court's application of the culpable conduct factor.

The district court relied on *Meadows v. Dominican Republic,* 817 F.2d 517 (9th Cir.), *cert. denied,* 484 U.S. 976 (1987), to conclude that BEB's conduct was not the result of excusable neglect. In *Meadows,* this court held that because the Dominican Republic knew the legal consequences, its failure to respond to a complaint constituted culpable conduct. *Id.* at 521-22.

[6] BEB cites *Gregorian v. Izvestia,* 871 F.2d 1515 (9th Cir.), *cert. denied,* 110 S. Ct. 237 (1989), in support of its argument that its conduct was not culpable. In *Gregorian,* the Soviet government, acting on the belief that neither international nor U.S. law provided jurisdiction over the plaintiffs' primary claims, instructed a Soviet trading organization to refuse to enter an appearance. The district court entered a default judgment against the non-appearing defendant and denied defendant's Rule 60(b) motion to set aside the default judgment. We held that the district court abused its discretion in denying defendant's Rule 60(b) motion. We explained that a defendant does not act culpably when it refuses to appear on instructions from its government where the instructions are based on the reasonable belief that the government and its entities are immune from suit. *Id.* at 1525.

[7] BEB contends that it failed to respond because of the Chinese government's refusal to grant its initial application for an exit visa and because of the disruption of normal business activities caused by the Tiananmen Square Incident. This case is distinguishable from *Gregorian* in that BEB does not allege that the PRC instructed it to refrain from entering an appearance. Rather, BEB simply alleges that the PRC refused to issue

it an exit visa. BEB presented no evidence to explain why it could not have communicated with the court through other channels. Moreover, Timber Falling presented evidence that during the same period BEB was able to secure local counsel in the United States to address other matters. In light of this evidence, we cannot say that the district court abused its discretion.

IV. Reviewability of the District Court's Order for a Judgment Debtor Examination

BEB also appeals the district court's January 11, 1991 order granting Timber Falling's motion for a judgment debtor examination. Timber Falling moves to dismiss this appeal.

[8] This court has not addressed the question whether orders granting *post-judgment* discovery are appealable. It is established that *pre-judgment* orders compelling discovery are not considerable final judgmentsw and may be appealed only after the issuance of a contempt order for failure to comply. *In re National Mortgage Equity Corp. Mortgage Pool Certificates Litig.*, 857 F.2d 1238, 1239 (9th Cir. 1988). We agree with the Eleventh Circuit that his same rule should apply to post-judgment orders granting discovery, such as judgment debtor examinations. *See Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp.*, 680 F.2d 743, 746 (11th Cir. 1982); *see also Wilkinson v. F.B.I.*, 922 F.2d 555, 558 (9th Cir. 1991) (citing with approval *Rouse Construction's* holding that post-judgment orders granting discovery are not appealable).

[9] Becase the district court has not found BEB in contempt of the order granting a judgment debtor examination, under the rationale of *In re National Mortgage,* we lack jurisdiction to review this appeal.

CONCLUSION

In short, personal jurisdiction existed and service of process was adequate. The district court did not abuse its discretion in finding culpable conduct. For these reasons, we affirm the judgment of the district court and the court's

denial of BEB's Rule 60(b) motion.

Moreover, we dismiss the judgment debtor examination appeal as premature because the district court has not yet issued a contempt cititation.

The decisions of the district court in case Nos. 90-35549 and 90-35894 are **AFFIRMED.**

The appeal in case No. 91-35280 is **DISMISSED.**

APPENDIX B

In The
United States District Court
For The District Of Oregon

RICHMARK CORPORATION,
a California corporation,
Plaintiff,

v.

TIMBER FALLING CONSULTANTS, INC.,
an Oregon corporation,
Defendant,

v.

TIMBER FALLING CONSULTANTS, INC.,
a Oregon corporation,
Counterclaim Plaintiff,

v.

RICHMARK CORPORATION,
a California corporation;
PEACOCK MANUFACTURING COMPANY, INC.,
a Texas corporation;
BEIJING EVER BRIGHT IND. CO., a foreign corporation;
ZHU YUANCHANG;
EUGENE WANG;
JAMES YANG; and
FRANCIS TONG
Counterclaim Defendants.

Civil No. 88-1203-FR

O R D E R

IT IS HEREBY ORDERED that:

1. The motion of counterclaim defendant Beijing Ever Bright Ind. Co. (Ever Bright) for relief from default judgment (#223) is DENIED.

2. The motion of Ever Bright for a protective order restricting discovery by defendant/counterclaim plaintiff, Timber Falling Consultants, Inc. (TFC), (#224) is deemed moot.

3. The motion of TFC to compel discovery from Ever Bright (#230) is GRANTED.

DATED this 15 day of October, 1990

HELEN J. FRYE
United States District Judge

In The
United States District Court
For The District Of Oregon

RICHMARK CORPORATION,
a California corporation,
Plaintiff,

v.

TIMBER FALLING
CONSULTANTS, INC.,
an Oregon corporation,
Defendant,

v.

TIMBER FALLING
CONSULTANTS, INC.,
a Oregon corporation,
Counterclaim Plaintiff,

v.

RICHMARK CORPORATION,
a California corporation;
PEACOCK MANUFACTURING
COMPANY, INC.,
a Texas corporation;
BEIJING EVER BRIGHT IND.
CO., a foreign corporation;
ZHU YUANCHANG;
EUGENE WANG;
JAMES YANG; and
FRANCIS TONG
Counterclaim Defendants.

Civil No.
88-1203-FR

OPINION

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FRYE, Judge:

The matters before the court are:

1. the motion of counterclaim defendant Beijing Ever Bright Ind. Co. (Ever Bright) for relief from default judgment (#223);

2. the motion of Ever Bright for a protective order restricting discovery by defendant/counterclaim plaintiff, Timber Falling Consultants, Inc., (TFC), (#224); and

3. the motion of TFC to compel discovery from Ever Bright (#230).

BACKGROUND

This acton originated as a claim for breach of contract by plaintiff, Richmark Corporation (Richmark) against TFC. In its Amended Answer and Counterclaims, TFC has asserted counterclaims against seven counterclaim defendants, including Ever Bright. Ever Bright is a company located in the People's Republic of China which engages in the import and export trade. Ever Bright was served with the Amended Answer and Counterclaims of TFC on March 20, 1989. Ever Bright did not appear within sixty days, and the court entered an order of default in favor of TFC and against Ever Bright on June 9, 1989.

On June 5, 1990, after all of the claims against the other counterclaim defendants had been resolved, this court entered final judgment against Ever Bright in the amount of $2,194,419.59. Ever Bright subsequently filed an appeal with the Ninth Circuit Court of Appeals, as well as its present motions for relief from the default judgment.

This court recently denied the motion of TFC for an order restraining Ever Bright from selling, transferring or otherwise disposing of its property in the United States until the default judgment is satisfied.

ANALYSIS AND RULINGS

1. *Motion for Relief From Default*

As a preliminary matter, TFC argues that this court does not have jurisdiction to consider Ever Bright's motion for relief from default because Ever Bright appealed to the Ninth Circuit. In *Gould v. Mutual Life Ins. Co.,* 790 F.2d 769 (9th Cir.), *cert denied,* 479 U.S. 987 (1986), the Ninth Circuit considered this issue at length. The court held that although the filing of a notice of appeal divests the district court of jurisdiction, a district court may consider a motion under Fed. R. Civ. P. 60(b) without first securing leave from the Ninth Circuit. 790 F.2d at 772-73.

The *Gould* court stated that the proper procedure, once an appeal has been taken, is to ask the district court

whether it wishes to entertain the motion or to grant it, and then, if appropriate, move the Ninth Circuit to remand the case. *Id.* at 772. Therefore, this court will consider the motion of Ever Bright on its merits and determine whether to move the Ninth Circuit to remand this case.

Federal Rule of Civil Procedure 60(b) provides that the court may relieve a party from a final judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore demoninated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The Ninth Circuit has held that Rule 60(b) is meant to be remedial in nature, and therefore must be liberally applied. *Falk v. Allen,* 739 F.2d 461, 463 (9th Cir. 1984). The *Falk* court set out three factors which should be evaluated in considering a motion to set aside a judgment of default under Rule 60(b); (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default. *Id.* at 463-64.

The standard for determining whether the plaintiff will be prejudiced is whether its ability to pursue its claim will be hindered if relief is granted. *Id.* In this case, there is no evidence that TFC would not be able to pursue its claim against Ever Bright if the case is reopened.

Ever Bright contends that it has not one but three meritorious defenses; that this court lacks personal

jurisdiction over it; that the service of process was defective; and that it cannot be held liable on the contract claims of TFC because Ever Bright did not contract with TFC or enter into an agency or joint venture relationship with Richmark.

TFC claims that Ever Bright is an "agency or instrumentality" of the People's Republic of China, and is therefore subject to the personal jurisdiction of this court under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603 (b). An agency or instrumentality of a foreign state includes any entity which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or is an entity, the majority of whose shares or other ownership interest is owned by a foreign state. *Id.*

TFC points to statements made by witnesses in depositions, newspaper and magazine articles, and to promotional materials published by Ever Bright which describe Ever Bright as:

> a state-owned comprehensive corporation with independent accounting and sole responsibility for its profits and losses and functions as a domestic import and export company . . . . BEBIC's goal is to develop foreign trade and foreign economic and technical cooperation of various forms in the service of the nation's modernization program, strictly in compliance with the laws and administrative statutes of the People's Republic of China and under the guidance of state policies and plans.

Exhibit A to Affidavit of John F. Neupert, p. 3.

Ever Bright contends that it is not an agency or instrumentality of the People's Republic of China. Ever Bright relies on materials which refer to it as a member of the Ever Bright Group, an entity which was established by China Everbright Holdings Company Limited, "a large non-governmental company" incorporated in Hong Kong. Exhibit F to Affidavit of John F. Neupert, p. 5. However, these materials do not suggest that Ever Bright is not owned or controlled by the People's Republic of

China. In fact, they include the statement that China Everbright was founded with the backing of the government of the People's Republic of China. *Id.*

Thus, the evidence strongly supports the conclusion that Ever Bright is an agency or instrumentality of the People's Republic of China and therefore subject to the personal jurisdiction of this court under the FSIA. Ever Bright has not submitted evidence sufficient to create a factual question as to this issue. Therefore, the court would find that Ever Bright is an agency or instrumentality of the People's Republic of China and that this court has personal jurisdiction over it.

Ever Bright contends, however, that even if the court finds that the FSIA applies to it, TFC cannot show that Ever Bright has the minimum contacts with the State of Oregon to permit this court to exercise personal jurisdiction over it. Under the FSIA, personal jurisdiction may be exercised by a court over an agency or instrumentality of a foreign government which engages in commercial activity which creates minimum contacts with the United States as a whole, not merely with the forum state, such as the State of Oregon. *Meadows v. Dominican Republic,* 817 F.2d 517, 523 (9th Cir.), *cert. denied,* 484 U.S. 976 (1987). The evidence submitted by the parties indicates that Ever Bright has engaged in commercial activity in the United States which would allow this court to exercise general jurisdiction over Ever Bright. Moreover, Ever Bright has had significant contacts with the State of California and with the State of Oregon in connection with this transaction, by contracting with Richmark, a California corporation; by meeting with Richmark in the State California; and by sending a ship to the State of Oregon for the export of logs.

Although a party seeking to set aside a judgment of default need not prove its defenses by a preponderance of the evidence, the party must produce competent evidence that tends to establish a factual legal basis for the tendered defense. *Bable v. Gray's Int'l of Oregon, Inc.,* Civil No. 88-495-FR (D. Or. Nov. 3, 1988). Ever Bright has

failed to produce evidence that tends to establish its defense of lack of personal jurisdiction.

Ever Bright's defense of defective service is based upon its contention that it is not subject to jurisdiction under the FSIA. Ever Bright does not contest that it was properly served under the FSIA, 28 U.S.C. § 1608, if the FSIA is applicable to it. Therefore, as Ever Bright has failed to present a meritorious defense to personal jurisdiction under the FSIA, Ever Bright's claim of defective service must also fail.

With respect to the defense on the merits raised by Ever Bright, TFC concedes that it did not contract directly with Ever Bright. TFC argues, however, that Ever Bright may be held liable because it employed Richmark as its agent or because Ever Bright was involved in a joint venture or partnership with Richmark. Ever Bright contradicts these allegations in the "Certification" of Liu Yan-Sheng, an attorney employed in the legal department of Ever Bright. This "Certification" is consistent in form with an affidavit or declaration under oath, and will be treated as such. The exhibits submitted by the parties are consistent with the position of Ever Bright that it contracted with Richmark as the seller of the logs in question.

As stated above, a party seeking to set aside a judgment of default need not prove its defenses by a preponderance of the evidence, but must simply produce competent evidence that tends to establish a factual or legal basis for the tendered defense. Ever Bright has produced such evidence, and therefore meets the requirement under Rule 60(b) that it show a meritorious defense.

Finally, the court must determine whether the judgment of default was entered as the result of the culpable conduct of Ever Bright. Ever Bright contends that its failure to respond to the counterclaims was due to circumstances beyond its control in the People's Republic of China, including the upheaval associated with the confrontation on Tiananmen Square in the Spring of 1989.

In his affidavit, Liu states that after receiving the summons and complaint, Ever Bright decided to send Liu

to the United States to obtain counsel to defend Ever Bright, that Liu applied for an exit permit from the government of China in April, 1989; that the application for an exit permit was denied because the government of China felt it was improper for a Chinese entity to appear in a foreign court if service has not been properly made; that the government of China granted permission for Liu to resubmit his application after Liu argued that there was a risk of a default judgment if Ever Bright did not respond; that the events relating to Tiananmen Square disrupted normal business activities during the period from early May to Late July, 1989; that after the disruption subsided, Liu resubmitted his application, but did not receive an exit permit until December 1989; and that Liu then applied to the United States Consulate for a business visa, but this application was denied in March, 1990.

The court accepts the fact that public events in the People's Republic of China disrupted the conduct of business in Beijing in 1989, and has disrupted relations between the United States and the People's Republic of China to the present time. However, Ever Bright does not present evidence that it made any other efforts to respond to the claims of TFC, or to secure an extension of time from TFC, despite Liu's admitted knowledge that failure to respond could result in a default judgment. On the other hand, TFC has presented evidence that during this same period of time, Ever Bright was able to secure counsel in the States of Washington and New York to deal with other matters. Ever Bright has submitted no evidence showing why it could not have acted through such counsel or why it could not have communicated with the court by mail or other means during the period of more than a year between the time it was served and the entry of the final judgment.

The facts in this case are similar to those in *Meadows v. Dominican Republic, supra,* 817 F.2d at 521-22, where the Ninth Circuit found that the failure of the Dominican Republic to respond to a complaint was culpable conduct because the Dominican Republic had been given warnings

of the legal consequences that could follow an order of default. Although Rule 60(b) is meant to be liberally applied, relief is not proper under Rule 60(b) where the defaulting party had actual notice of the summons and complaint and was aware of the dangers of ignoring service of process. *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.,* 840 F.2d 685, 690 (9th Cir. 1988).

Therefore, the court finds that the behavior of Ever Bright does not constitute execusable neglect, and therefore Ever Bright fails to meet the requirements for relief under Rule 60(b). The court is not inclined to entertain the motion of Ever Bright for relief under Rule 60(b) and therefore declines to recommend to the Ninth Circuit that it remand the case to this court.

2. *Discovery Motions*

TFC moves to compel discovery from Ever Bright, and Ever Bright moves for a protective order restricting such discovery. TFC seeks to require Ever Bright to answer TFC's first and second sets of interrogatories, to produce the documents requested in TFC's notice of deposition and request for production of documents, and to produce representatives for deposition. All of these discovery requests are connected with the enforcement of the judgment of default entered against Ever Bright.

Ever Bright's motion for a protective order is moot as Ever Bright sought only to prevent discovery pending the decision of this court on Ever Bright's motion for relief from default. Ever Bright has not posted a supersedeas bond, so TFC is free to attempt to enforce its judgment during the pendency of Ever Bright's appeal. Therefore, the motion of TFC to compel the above-described discovery is granted. In light of the practical difficulties posed by travel to and from the People's Republic of China, the parties are instructed to confer and attempt to reach an agreement regarding the times and places for the taking of depositions.

CONCLUSION

Ever Bright's motion for relief under Rule 60(b) (#223) is denied. Ever Bright's motion for a protective order (#224) is deemed moot. TFC's motion to compel discovery from Ever Bright (#230) is granted.

DATED this 15 day of October, 1990.

HELEN J. FRYE
United States District Judge

APPENDIX C

In The
United States District Court
For The District Of Oregon

RICHMARK CORPORATION, a California corporation, Plaintiff,	)	Civil No. 88-12030-FR
v.	)	
TIMBER FALLING CONSULTANTS, INC., an Oregon corporation, Defendant.	)	ORDER

IT IS HEREBY ORDERED that the motion (#193) of Timber Falling Consultants, Inc. for entry of final judgment as to Beijing Ever Bright Ind. Co. and to allow execution to issue against Beijing Ever Bright Ind. Co. is GRANTED. Timber Falling Consultants, Inc. shall submit a form of judgment consistent with these findings.

DATED this 31 day of May, 1990.

HELEN J. FRYE
United States District Judge

In The
United States District Court
For The District Of Oregon

RICHMARK CORPORATION, a California corporation, Plaintiff,	)	Civil No. 88-12030-FR
v.	)	
TIMBER FALLING CONSULTANTS, INC., an Oregon corporation, Defendant.	)	OPINION

Thomas V. Dulcich
Kurt F. Hansen
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Attorneys for Plaintiff

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Attorneys for Defendant

FRYE, Judge:

The matter before the court is the motion (#193) of counterclaimant Timber Falling Consultants, Inc. (TFC) for entry of final judgment as to counterclaim defendant Beijing Ever Bright Ind. Co. (Ever Bright).

BACKGROUND

In its Amended Answer and Counterclaims, TFC asserts counterclaims against seven counterclaim defendants, including Ever Bright. Ever Bright is a state enterprise organized by the government of the People's Republic of China which engages in import and export trade. Ever Bright was served with the Amended Answer and Counterclaims in accordance with the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608 (FSIA), on March 20, 1989. Ever Bright did not appear within sixty days, and the court entered an order of default against Ever Bright on June 9, 1989.

All of the claims in this action have now been resolved, with the exeption of the claims against Ever Bright. TFC moves for the entry of final judgment against Ever Bright on TFC's third counterclaim for breach of contract, fifth counterclaim for civil conspiracy and fraud, and seventh counterclaim for civil conspiracy and fraud, and seventh counterclaim for tortious interference. TFC seeks judgment for compensatory damages of $2,194,419.59 and punitive damages of $10,000,000. TFC also moves for an order allowing execution of the default judgment thirty days after TFC serves Ever Bright with a copy of the default judgment.

ANALYSIS AND RULING

The court has reviewed the file, the affidavits, and the exhibits filed by TFC in support of this motion. Ever Bright is not entitled to notice of the motion for default judgment, as it has never appeared in this action. Fed. R. Civ. P. 55(b)(2). Each of the other counterclaim defendants was served with notice of this motion, and the court has received no objections to the proposed default judgment.

Under the FSIA, "[n]o judgment by default shall be entered by a court of the United States . . . against . . . an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e).

TFC has submitted evidence sufficient to satisfy the

court that Ever Bright was a joint venture with Richmark, and is thus subject to liability under the contract between Richmark and TFC. The evidence also supports a finding that Ever Bright participated in a civil conspiracy to fraudulently induce TFC to enter into the contract. However, since the court has found that Ever Bright should be treated as a party to the contract, Ever Bright may not be held liable to interference with that contract. Accordingly, the court finds in favor of TFC on the third counterclaim for breach of contract and the fifth counterclaim for civil conspiracy and fraud, but finds in favor of Ever Bright on the seventh counterclaim for tortious interference.

In this case, the claim is not for a sum certain or for a sum which can by computation be made certain as provided in Fed. R. Civ. P. 55(b)(1). Therefore, the court must determine the amount of damages to be awarded. The affidavits and exhibits submitted by TFC support an award of compensatory damages in the amount of $2,194,419.59. This figure includes $1,835,075.39 in lost profits, $98,466.03 for out-of-pocket expenses, $23,052.84 in additional interest expense, and $237,825.33 in prejudment interest. TFC also asks for an award of punitive damages in the amount of $10,000,000. The court declines on the record before it to grant an award of punitive damages.

The court grants TFC's motion to allow execution to issue thirty days after the date of service of the default judgment on Ever Bright. The court finds that thirty days is a reasonable period of time under the FSIA, 28 U.S.C. § 1610(c).

CONCLUSION

The motion (#193) of TFC for entry of final judgment as to Ever Bright and to allow execution to issue against Ever Bright is granted. TFC shall submit a form of judgment consistent with these findings.

DATED this 31 day of May, 1990.

HELEN J. FRYE
United States District Judge

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHMARK CORPORATION,
a California corporation,
Plaintiff-counter-claim-defendant,
v.
TIMBER FALLING CONSULTANTS, INC.,
an Oregon corporation,
Defendant-counter-claim-3rd-party plaintiff-Appellee,
v.
PEACOCK MANUFACTURING COMPANY, INC.,
a Texas corporation,
ZHU YUANCHANG; EUGENE WANG; JAMES YANG; FRANCIS TONG,
Third-party-defendants,
and
BEIJING EVER BRIGHT INDUSTRIAL COMPANY,
a foreign corporation,
Third-party-defendant-Appellant.

Nos. 90-35549, 90-35894, and 91-35280

D.C. No. CV-88-1203-HJF

O R D E R

Before: PREGERSON, BRUNETTI, and T.G. NELSON, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc filed by Beijing Ever Bright Industrial Company in case No. 90-35894.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested

a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment V:

[N]or shall any person be deprived of life, liberty, or property, without due process of law; . . .

United States Statutes

Title 28, Chapter 97 - JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

28 U.S.C. § 1330. Actions against foreign states

* * *

(b) Personal Jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

* * *

28 U.S.C. § 1608. Service; time to answer, default

* * *

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

* * *

(2) if no special arrangement [between the plaintiff and the agency or instrumentality] exists, . . . in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state –

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

* * *

(e) No judgment by default shall be entered by a court of the United States or of a State against... an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. ...

Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.

Federal Rules Of Civil Procedure

Fed. R. Civ. P. 60(b):

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or

proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . .

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987

APPENDIX F

PEOPLE'S REPUBLIC OF CHINA

Consular Relations

Convention, with exchange of notes, signed at Washington September 17, 1980;
Transmitted by the President of the United States of America to the Senate January 19, 1981 (Treaty Doc. No. 97-3, 97th Cong., 1st Sess.);
Reported favorably by the Senate Committee on Foreign Relations June 17, 1981 (S. Ex. Rept. No. 97-14, 97th Cong., 1st Sess.);
Advice and consent to ratification by the Senate December 11, 1981;
Ratified by the President January 4, 1982;
Ratified by the People's Republic of China January 26, 1981;
Ratifications exchanged at Beijing January 19, 1982;
Proclaimed by the President February 8, 1982;
Entered into force February 19, 1982.
And modifying agreement
Effected by exchange of notes
Dated at Beijing January 17, 1981;
Entered into force February 19, 1982.

BY THE PRESIDENT OF
THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Consular Convention between the United States of America and the People's Republic of China, together with related notes, was signed at Washington on September 17,

1980, the texts of which are hereto annexed;

The Senate of the United States of America by its resolution of December 11, 1981, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Convention;

The Convention was ratified by the President of the United States of America on January 4, 1982, in pursuance of the advice and consent of the Senate, and was duly ratified on the part of the People's Republic of China;

It is provided in Article 42 of the Convention that the Convention shall enter into force after the expiration of thirty days following the date of the exchange of instruments of ratification;

The instruments of ratification of the Convention were exchanged at Beijing on January 19, 1982, and accordingly the Convention enters into force on February 19, 1982;

Now, THEREFORE, I, Ronald Reagan, President of the United States of America, proclaim and make public the Convention to the end that it shall be observed and fulfilled with good faith on and after February 19, 1982, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

In TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this eighth day of February in the year of our Lord one thousand nine hundred eighty-two and of the Independence of the United States of America the two hundred sixth.

[seal]

RONALD REAGAN

By the President:

WALTER J STOESSEL

Acting Secretary of State

BEST AVAILABLE COPY

CONSULAR CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE PEOPLE'S REPUBLIC OF CHINA

The Government of the United States of America and the Government of the People's Republic of China,

Desiring to regulate and strengthen their consular relations, in order to promote the development of friendly and cooperative relations between the two countries, and thus to facilitate the protection of their national interests and the protection of the rights and interests of their nationals,

Have decided to conclude this Consular Convention and have appointed as their plenipotentiaries the following:

For the United states of America:

Jimmy Carter, President

For the People's Republic of China:

Bo Yibo, Vice Premier

Who, having examined and exchanged their respective full powers, which were found in good and due form, have agreed as follows:

ARTICLE 1

Definitions

For the purpose of the present Convention, the terms listed below shall have the following meanings:

1. "Consulate" means a consulate general, consulate, vice consulate, or consular agency;

2. "Consular district" means the area assigned to a consulate for the exercise of consular functions;

3. "Head of a consulate" means the consul general, consul, vice consul or consular agent who is charged by the sending State to head a consulate;

4. "Consular officer" means any person, including the head of a consulate, who is charged by the sending State with the performance of consular functions;

5. "Consular employee" means any person who performs administrative, technical, or service functions at a consulate,

6. "Member of a consulate" means any consular officer or consular employee;

7. "Members of the family" means the spouse, minor children and other relatives of a member of a consulate who form a part of his household;

8. "Consular premises" means buildings or parts of buildings, as well as the grounds ancillary thereto, used exclusively for the purposes of a consulate, regardless of ownership;

9. "Consular archives" means all correspondence, codes and ciphers, documents, records, files, tapes and books of a consulate, as well as any article of furniture intends for their storage or safekeeping;

10. "Vessel of the sending State" means any vessel sailing under the flag of the sending State, in accordance with the law of the sending State, excluding military vessels;

11. "Aircraft of the sending State" means any aircraft flying under the nationality and registration marks of the sending state, in accordance with the law of the sending State, excluding military aircraft:

12. "Law" means

-- for the People's Republic of China, all national, provincial, municipal, autonomous region and local laws, ordinances, regulations and decisions having the force and effect of law;

-- for the United States of America, all federal, state or local laws, ordinances, regulations and decisions having the force and effect of law.

* * *

ARTICLE 22

Functions of Consular officers

1. The functions of a consular officer consist of:

(a) protecting the rights and interests of the sending State and of its nationals, including juridical persons;

(b) rendering assistance to and cooperating with nationals of the sending State, including

juridical persons;

(c) contributing to the development of economic, commercial, cultural, scientific and tourist relations between the sending and the receiving States;

(d) promoting in various ways the development of friendly relations between the sending and the receiving States;

(e) ascertaining by all lawful means conditions and developments in the political, commercial, economic, cultural, educational and scientific-technological life of the receiving State, and reporting thereon to the government of the sending State.

2. A consular officer shall, if authorized by the sending State, be entitled to carry out the functions describe in this Convention, as well as other consular functions which are not prohibited by the law of the receiving State or to which the receiving State does not object.

ARTICLE 23

Execution of Consular Functions

1. A consular officer shall be entitled to execute his functions only within the consular district. A consular officer may execute his functions outside the limits of the consular district only with the advance consent of the receiving State given separately in each instance.

2. In executing his functions, a consular officer may approach orally or in writing:

(a) the competent local authorities in the consular district;

(b) the competent central authorities of the receiving State, if and to the extent allowed by the law and customs of the receiving State.

3. with the advance approval of the receiving State, the sending State may perform consular functions in the receiving State on behalf of a third State.

4. A consulate may levy in the territory of the receiving State consular fees authorized under the law of the sending State for consular acts. Any such sums levied shall be exempt from all dues and taxes in the receiving State.

ARTICLE 24

Representation before the Authorities of the Receiving State

1. A consular officer shall be entitled, in accordance with the law of the receiving State, to take appropriate measures for the protection of the rights and interests of nationals of the sending State, including juridical persons, before the courts and other authorities of the receiving state, where, because they are not present in the receiving State or for any other reason, these nationals are not in a position to undertake timely defense of their rights and interests.

2. The measures referred to in paragraph 1 of this Article shall cease as soon as the national appoints his own representative or the national assumes the defense of his rights and interests.

3. Nothing in this Article, however, shall be construed to authorize a consular officer to act as an attorney-at-law.

ARTICLE 25

Functions with Regard to Travel Documents

A consular officer shall be entitled to:

1. issue to nationals of the sending State passports or similar travel documents, as well as make amendments in them;

2. issue visas or other appropriate documents to persons wishing to travel to or through the sending State.

* * *

ARTICLE 27

Notarial Functions

A consular officer shall be entitled to:

1. receive and witness statements made under oath or affirmation, and, in accordance with the law of the receiving State, to receive the testimony of any person for use in connection with a legal proceeding in the sending State;

2. draw up or authenticate any act or document, as well as copies or extracts thereof, of a national of the

sending State, including a juridical person, for use outside the receiving State or of any person for use in the sending State, or perform other notarial functions;

3. authenticate documents issued by competent authorities of the receiving State for use in the sending State.

ARTICLE 28

Legal Force of Documents Prepared by a Consular officer

The acts and documents certified or legalized by a consular officer of the sending State, as well as copies, extracts and translations of such acts and documents certified by him, shall be receivable in evidence in the receiving State as official or officially certified acts, documents, copies, translations or extracts, and shall have in the receiving State the same validity and effect as the documents certified or legalized by the competent authorities of the receiving State, provided they have been drawn and executed in conformity with the law of the receiving State and with the law of the country in which they are to be used.

ARTICLE 29

Serving Judicial and Other Legal Documents

A consular officer shall be entitled to serve judicial and other legal documents in accordance with international agreements in force between the sending and receiving

States or, in the absence of such agreements, to the extent permitted by the law of the receiving State.

* * *

ARTICLE 41

Observing the Law of the Receiving State

1. All persons enjoying privileges and immunities under this convention are obliged, without prejudice to their privileges and immunities, to observe the law of the receiving State, including traffic regulations, and to respect the customs of the receiving State, and may not interfere in the internal affairs of the receiving State.

* * *

ARTICLE 42

Entry into Force and Renunciation

1. The present Convention shall be subject to ratification. The exchange of instruments of ratification shall take place as soon as possible at Beijing.

2. The present Convention shall enter into force after the expiration of thirty days following the date of the exchange of instruments of ratification.[1]

3. The present Convention shall remain in force until the expiration of six months from the date on which one of the Contracting Parties gives to the other Contracting Party written notification of its intention to terminate the Convention.

---

[1]Feb. 19, 1982.

DONE at Washington this seventeenth day of September, 1980, in duplicate in the English and Chinese languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:	FOR THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA:
/s/ Jimmy Carter	/s/ Bo Yibo

APPENDIX G

最高人民法院
外　交　部
司　法　部
关于我国法院和外国法院通过外交途径相互委托送达法律文书若干问题的通知

外发〔1986〕47号

全国各有关法院、各驻外使领馆：

目前，在我国与外国没有双边协议的情况下，有关涉外民事、经济等方面诉讼的法律文书，一般按互惠原则通过外交途径送达。过去，由于送达的法律文书不多，没有制定统一的规定。随着我国实行对外开放政策，涉外民事、经济等方面诉讼案件中需要送达的法律文书日益增多，为适应新的形势，针对过去在法律文书送达方面的问题，现根据我国民事诉讼法（试行）的有关规定，对我国法院和外国法院通过外交途径相互委托送达民事、经济等方面诉讼的法律文书的若干问题通知如下：

一、凡已同我国建交国家的法院，通过外交途径委托我

国法院向我国公民或法人以及在华的第三国或无国籍当事人送达法律文书，除该国同我国已订有协议的按协议办理外，一般根据互惠原则按下列程序和要求办理：

1．由该国驻华使馆将法律文书交外交部领事司转递给有关高级人民法院，再由该高级人民法院指定有关中级人民法院送达给当事人。当事人在所附送达回证上签字后，中级人民法院将送达回证退高级人民法院，再通过外交部领事司转退给对方；如未附送达回证，则由有关中级人民法院出具送达证明交有关高级人民法院，再通过外交部领事司转给对方。

2．委托送达法律文书须用委托书。委托书和所送法律文书须附有中文译本。

3．法律文书的内容有损我国主权和安全的，予以驳回；如受送达人享有外交特权和豁免，一般不予送达；不属于我国法院职权范围或因地址不明或其他原因不能送达的，由有关高级人民法院提出处理意见或注明妨碍送达的原因，由外交部领事司向对方说明理由，予以退回。

二、外国驻华使、领馆可以直接向其在华的本国国民送达法律文书，但不得损害我国主权和安全，不得采取强制措施。如对方通过外交途径委托我方向其在华的该国国民送达法律文书，亦可按第一条的规定予以送达。

三、对拒绝转递我国法院通过外交途径委托送达法律文书的国家或有特殊限制的国家，我可根据情况采取相应措施。

四、我国法院通过外交途径向国外当事人送达法律文书，应按下列程序和要求办理：

1．要求送达的法律文书须经省、自治区、直辖市高级人民法院审查，由外交部领事司负责转递。

2．须准确注明受送达人姓名、性别、年龄、国籍及其在国外的详细外文地址，并将该案的基本情况函告外交部领事司，以便转递。

3．须附有送达委托书。如对方法院名称不明，可委托当事人所在地区主管法院。委托书和所送法律文书还须附有该国文字或该国同意使用的第三国文字译本。如该国对委托书及法律文书有公证、认证等特殊要求，将由外交部领事司逐案通知。

五、我国法院向在外国领域内的中国籍当事人送达法律文书，如该国允许我使、领馆直接送达，可委托我驻该国使、领馆送达。此类法律文书可不必附有外文译本。

六、我国法院和外国法院通过外交途径相互委托送达法律文书的收费，一般按对等原则办理。外国法院支付我国法院代为送达法律文书的费用，由外交部领事司转交有关高级人民法院；我国法院支付外国法院代为送达法律文书的费用，由有关高级人民法院交外交部领事司转递。但应委托一方要求用特殊方式送达法律文书所引起的费用，由委托一方负担。

七、中、日（本）双方法院委托对方法院代为送达法律文书，除按上述有关原则办理外，还应依照最高人民法院一九八二年十月十二日《关于中、日两国之间委托送达法律文书使用送达回证问题的通知》办理。

八、我国法院和外国法院通过外交途径相互委托代为调查或取证，参照以上有关规定办理。

本通知自发出之日起实行。执行中有何问题，请报有关单位。

一九八六年八月十日

[TRANSLATION]

NOTICE ISSUED BY SUPREME PEOPLE'S COURT, MINISTRY OF FOREIGN AFFAIRS AND MINISTRY OF JUSTICE CONCERNING SOME QUESTIONS PERTAINING TO MUTUAL TRUST FOR DELIVERY OF LEGAL DOCUMENTS BETWEEN CHINA AND FOREIGN COUNTRIES THROUGH DIPLOMATIC CHANNEL

Waifa (1986) No. 47

To all interested courts in the country and all embassies and consulates abroad:

At present, in the absence of bilateral agreements between our country and foreign countries, legal documents related to civil and economic law suits are, in general, delivered through the diplomatic channel under the principle of reciprocity. In the past, due to the fact that the amount of legal documents for delivery was not so great, no unified provisions have been made. Following the implementation by our country of the policy of opening the country to the outside world, the amount is ever more increasing of legal documents to be delivered in civil and economic law suits involving foreign quarters. In order to cope with the new situation and in the light of the question of delivery of legal documents in the past, the following notice is issued on some questions pertaining to mutual trust to deliver legal documents in civil and economic law suits between China and foreign countries through the diplomatic channel in accordance with relevant provisions of the Civil Procedural Law (in experimental enforcement) of our country:

1. When a court of a country which has established diplomatic relations with our country entrusts, through the diplomatic channel, a court of our country to deliver legal documents to a chinese citizen or legal person or a national of a third country or a stateless litigant in China, the following procedure and requirement are followed, in general, under the principle of reciprocity, with the exception of those countries which have relevant

agreements with our country, in which case the agreements are adhered to:

(1) The embassy of that country in China is to bring the legal document to the Consular Department of the Ministry of Foreign Affairs for transmission to the interested higher people's court, which must then appoint the interested intermediate people's court for delivery to the litigant. The litigant is to sign on the attached service voucher. The interested intermediate people's court is to return the voucher to the higher people's court for delivery back to the foreign party through the Consular Department of the Ministry of Foreign Affairs. If no such voucher is attached, the interested intermediate people's court is to issue a service voucher to the interested higher people's court for delivery to the other party through the Consular Department of the Ministry of Foreign Affairs.

(2) A letter of trust must accompany a trust to deliver legal documents. The letter of trust and the legal documents to be delivered must be accompanied by Chinese translation texts.

(3) If the contents of the legal documents are detrimental to the sovereignty and security of our country, these are to be rejected. Delivery is not to be effected generally if the person to receive the documents enjoys diplomatic immunity. Delivery cannot be effected if it is not within the jurisdiction of a court of our country, or if the address is not explicit or for any other reason. The interested higher people's court is to furnish its views or indicate the reasons handicapping the delivery. The legal documents are to be returned by the Consular Department of the Ministry of Foreign Affairs giving the reasons to the other party.

2. The foreign embassies and consulates in China can directly send legal documents to their own nationals, but they should not harm Chinese sovereignty, nor should they adopt any compulsory measure. If, through the diplomatic channel, the other party entrusts us to deliver legal documents to its nationals in China, delivery can be effected according to the provisions of Article 1.

3. We may take corresponding measures in the light of the situation towards the countries and countries with special restrictions which refuse to transmit legal documents from courts in our country through the diplomatic channel.

4. The courts of our country should adhere to the following procedure and requirement when they delivery legal documents through the diplomatic channel:

(1) The legal document to be delivered should be first examined by the higher people's court in a province, autonomous region or directly-controlled municipality before transmission through the Consular Department of the Ministry of Foreign Affairs.

(2) The name, sex, age and nationality of the receiver must be indicated explicitly as well as the address in a foreign country in detail in foreign language. The basic situation of the case must be given in writing to the Consular Department of the Ministry of Foreign Affairs in order to facilitate transmission.

(3) A letter of trust for delivery must be attached. If the name of the court of the other party is not clear, the trust can be arranged with the local court in charge of the locality of the litigant. The letter of trust and the legal document to be delivered must be accompanied by translated texts in the language of that country or in the language of a third country agreed to by that country. If the trust letter and legal document must be accompanied by special notarization as required by the other party, the Consular Department of the Ministry of Foreign Affairs should give notice one by one.

5. When a court of our country wants to deliver legal documents to a Chinese litigant on the territory of a foreign country, it can trust our embassy or consulate in that country to effect delivery, provided that the country permits delivery by our embassy or consulate directly. Such legal documents may not be accompanied by translation in a foreign language.

6. The collection of fees in mutual trust between China and foreign countries for the delivery of legal documents

through the diplomatic channel is effected, in general, under the principle of reciprocity. The fees paid by a foreign country for the delivery of legal documents should be transferred by the Consular Department of the Ministry of Foreign Affairs to the interested higher people's court. The fees for the delivery of legal documents paid by a Chinese court to a foreign court should be sent by the interested higher people's court through the Consular Department of the Ministry of Foreign Affairs. However, the fees incurred in the delivery of legal documents by special means as required by the party arranging the trust are to be borne by that party.

7. The arrangements between Chinese and Japanese courts for the delivery of legal documents, apart from the principles mentioned above, should also follow the "Notice Concerning the Question of Service Voucher for the Delivery by Trust of Legal Documents Between China and Japan" issued by the Supreme People's Court on October 12, 1982.

8. The mutual trust between China and foreign courts, through the diplomatic channel, for making investigation or securing evidence should be handled in the light of the abovementioned provisions.

The notice comes into force on the day on which it is issued. Any question arising out of its implementation is to be reported to the interested department.

August 14, 1986.

APPENDIX H

SELECTED INTERNATIONAL CONVENTIONS

Annotations provided by U.S. Department of State. Current information on the status of these conventions is always available from the Treaty Affairs Section of the Office of the Legal Adviser, Department of State, Washington, D.C. 20520.

CONVENTION OF THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article I

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I — JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall be both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either —

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the offical languages, of the State in which the documents originate.

The correponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting

State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with —

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by —

(a) the employment of a judicial officer or of a person competent under the law of the State of destination,

(b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that —

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled —

(a) the document was transmitted by one of the methods

provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled —

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

(b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II — EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III — GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with —

(a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,

(b) the language requirements of the third paragraph of article 5 and article 7,

(c) the provisions of the fourth paragraph of article 5,

(d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following —

(a) the designation of authorities, pursuant to articles 2 and 18,

(b) the designation of the authority competent to complete the certificate pursuant to article 6,

(c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of —

(a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

(b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

(c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905,[1] and on 1st March 1954,[2] this Convention shall replace as between them articles 1 to 7 or the earlier Conventions.

[1] 99 BFSP 990

[2] 286 UNTS 265

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 or the Convention on civil procedure signed at the Hague on 1st March 1954.

These articles shall, however, apply only if methods of communications, identical to those provided for in these Conventions are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a

period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall tke effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands ta least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following —

(a) the signatures and ratifications referred to in article 26;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

(c) the accessions referred to in article 28 and the dates on which they take effect;

(d) the extensions referred to in article 29 and the dates on which they take effect;

(e) the designations, oppositions and declarations referred to in article 21;

(f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at the Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of The States represented at the Tenth Session of the Hague Conference on Private International Law.

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters. Done at The Hague November 15, 1965; entered into force for the United States February 10, 1969, 20 UST 361; TIAS 6638; 658 UNTS 163. States which are parties:

Antigua and Barbuda[1]
Barbados[1a]
Belgium[2]
Botswana[2a]
Canada[3]
Cyprus[3a]
Czechoslovakia[3b]
Denmark[4]
Egypt[5]
Finland[6]
France[7]
Federal Republic of Germany[7a]
Greece[7b]
Israel[8]
Italy[8a]
Japan[9]
Luxembourg[9a]
Malawi[10]
Netherlands[10a]
Norway[11]
Pakistan[11a]
Portugal[11b]
Seychelles[11c]
Spain[11d]
Sweden[12]
Turkey[13]
United Kingdom[14]
United States[15]

APPENDIX I

EXCERPTS FROM SELECTED CONSULAR CONVENTIONS BETWEEN THE UNITED STATES AND CERTAIN COUNTRIES THAT ARE NOT PARTIES TO THE HAGUE CONVENTION

1. The Consular Convention between The Bahamas and the United States (1973), 3 UST 3440 TIAS 2494, Article 17:

(1) A consular officer may within his district:

* * *

(g) serve judicial documents or take evidence on behalf of courts of the sending state in a manner permitted under special arrangements on this subject between the High Contracting Parties or otherwise not inconsistent with the laws of the territory.

2. The Consular Convention between Bulgaria and the United States (1974), 26 UST 709, TIAS 8067, Article 36:

Serving Judicial Documents

A consular officer shall be entitled to serve judicial and other documents on nationals of the sending State in accordance with existing international agreements, or, in the absence of such agreements, to the extent permitted by the law of the receiving State.

3. The Consular Convention between Hungary and the United States (1973) 24 UST 1167; TIAS 7641, Article 36:

A consular officer shall be entitled to serve judicial documents and execute letters rogatory in accordance with international agreements in force or otherwise not inconsistent with the laws and regulations of the receiving state.

4. The Consular Convention between Ireland and the United States (1950), 5 UST 982 TIAS 2984. Article 27:

(1) A consular officer may within his district:

* * *

(g) serve or cause to be served judicial documents or take evidence on behalf of courts of the sending state in a manner permitted under special arrangements on this subject between the High Contracting Parties or otherwise not inconsistent with the laws of the territory.

5. The Consular Convention between Malaysia and the United States (1957) 3 UST 3440; TIAS 2494, Article 17:

(1) A consular officer may within his district:

* * *

(g) serve judicial documents or take evidence on behalf of courts of the sending state in a manner permitted under special arrangements on this subject between the High Contracting Parties or otherwise not inconsistent with the laws of the territory.

6. The Consular Convention between Malta and the United States (1964), 3 UST 3440; TIAS 2494, Article 17:

(1) A consular officer may within his district:

* * *

(g) serve judicial documents or take evidence on behalf of courts of the sending state in a manner permitted under special arrangements on this subject between the High Contracting Parties or otherwise not inconsistent with the laws of the territory.

7. The Consular Convention between Singapore and the United States (1965); 3 UST 3440 TIAS 2494, Article 17:

(1) A consular officer may within his district:

* * *

(g) serve judicial documents or take evidence on behalf of courts of the sending state in a manner permitted under special arrangements on this subject between the High Contracting Parties or otherwise not inconsistent with the laws of the territory.

(2)

No. 91-1195

Supreme Court, U.S.
FILED
FEB 14 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

BEIJING EVER BRIGHT INDUSTRIAL COMPANY,
Petitioner,

v.

TIMBER FALLING CONSULTANTS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner misstates the issues properly presented to this Court.

1. Constitutionality of National Contacts Standard. The issue, properly stated, is whether the personal jurisdiction provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1601 et seq. ("FSIA"), violate the Due Process Clause of the Fifth Amendment. That issue was not presented to the courts below.

2. Service of Process.
The issue presented is whether the Ninth Circuit Court of Appeals erred in concluding that service of process need not be effected pursuant to an optional procedure set forth in a bilateral consular convention between the United States and the People's Republic of China ("PRC") under the circumstances of this case.

3. Relief From Default Judgment.
The issue presented is whether the Ninth Circuit Court of Appeals erred in concluding that the district court did not abuse its discretion in declining to set aside the default judgment under the circumstances of this case.

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No. 91-1195

IN THE

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October Term, 1991

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, Timber Falling Consultants, Inc. ("TFC")*, supplements and clarifies petitioner's statement as follows.

A. Facts Material to Consideration of Questions Presented.

Petitioner, Beijing Ever Bright Industrial Company ("Beijing Ever Bright"), has misstated and omitted facts found by the district court[1] and established by the record. TFC summarizes some of the more pertinent misstatements and omissions here, as required by Supreme Court Rule 15.1.

1. Beijing Ever Bright.

Beijing Ever Bright claims that it had virtually no contacts with either the state of Oregon or with the United States; the record is to the contrary.[2] One of Beijing Ever

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* TFC has no parent or subsidiary corporations. See Supreme Court Rule 29.1.

[1]Under the FSIA, the district court could not enter judgment by default until TFC "establish[ed] [its] claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). TFC submitted evidence in support of its claim; based on that evidence, the district court found that TFC was entitled to relief. *See* Opinion dated May 31, 1990, Supp ER 199. Beijing Ever Bright did not challenge the sufficiency of evidence supporting the district court's findings; those findings cannot be challenged for the first time here.

[2]Beijing Ever Bright's assertion of absence of contacts is subject to serious question in light of its refusal to obey the district court's orders to disclose the whereabouts of assets, a refusal that has resulted in an order of contempt that is the subject of a separate appeal pending before the Ninth Circuit Court of Appeals. *See* Appeal Nos. 91-35966 and 91-36059.

Bright's officers, Zhu Yuanchang ("Zhu"),[3] negotiated many transactions with a California export company (Richmark Corporation) that Zhu referred to as Beijing Ever Bright's "West Coast agent." Affidavit of George E. Stafford, ER 195, ¶ 2.

That "agent" had numerous contacts with the state of Oregon, including negotiating the original contract with TFC and meeting with TFC's president in Portland, Oregon. Affidavit of D. Douglas Dent ("Dent Aff."), ER 195, ¶¶ 4, 5, 19; Affidavit of John F. Neupert ("Neupert Aff."), ER 233, ¶ 8.

Beijing Ever Bright also sent two of its officers to the state of Washington to establish a new corporation (known as Ever Bright Timber) to be used to send logs from the Pacific Northwest to the PRC. Neupert Aff., ER 233, ¶¶ 20-21. Beijing Ever Bright dispatched a ship to Oregon to take possession of logs it had purchased from Oregon. Dent Aff., ER 195, ¶¶ 11-12.

During 1988-89, Beijing Ever Bright transferred more than $4.6 million to an affiliated New York corporation, Solid Beam Industrial Corp. ("Solid Beam"), for various business dealings in the United States. Affidavit of Ni Zhen, Supp ER, Tab 1, ¶ 4, and Ex. B. *See also* Neupert Aff., Supp ER 259, ¶¶ 5-8, and Ex. D. Solid Beam refers to itself as Beijing Ever Bright's United States "agent." Affidavit of Daniel O. Norris, Supp ER 49, ¶ 3, and Ex. D. Beijing Ever Bright transferred $7.5 million to Solid Beam to fund the purchase of a 51 percent interest in a Pennsylvania engineering firm. Neupert Aff., Supp ER 259, ¶ 8. During the period 1987-89, Beijing Ever Bright entered into at least nine separate engineering contracts with that firm. Neupert Aff., CR 369, ¶ 7, and Ex. C.

[3]Zhu's conduct is the principal basis for the district court's conclusion that Beijing Ever Bright participated in a civil conspiracy to defraud TFC. *See* Opinion dated May 31, 1990, Supp ER 200, p. 3, lines 13-15.

2. The Contract.

Beijing Ever Bright claims that it was "not aware" that TFC was involved in the underlying transaction. However, the letter of credit furnished by Beijing Ever Bright to provide for payment of the logs specifically provides that it is transferrable *to TFC*. Neupert Aff., ER 233, ¶ 10, and Ex. H.

Beijing Ever Bright states that the parties "disagree" on the nature of the meeting that took place in Los Angeles. The record does not reflect any such disagreement. According to TFC, prior to the meeting, an illegal kickback was solicited, in part, for the benefit of Zhu, one of Beijing Ever Bright's officers. Dent Aff., ER 195, ¶ 19. Zhu then met with TFC in California and threatened to "tear up" the underlying contract unless TFC agreed to various contract concessions. Dent Aff., ER 195, ¶¶ 13-14. The record does not establish any dispute over these facts; Beijing Ever Bright simply states that it has "no knowledge of any such wrongdoing" and that Zhu "is presently under criminal investigation in China." Liu Certification, ER 225, ¶ 26.

Beijing Ever Bright also claims that, after the transaction with TFC fell apart, it obtained "commercially reasonable cover" (i.e., logs) that were inspected in Oregon, but not by employees of Beijing Ever Bright. However, the record actually establishes that replacement logs were obtained from another Oregon company that paid a $30,000 kickback, at least $10,000 of which was paid to Zhu in California. Dent Aff., ER 195, ¶ 19. Zhu personally inspected logs being loaded on a ship in Oregon. Neupert Aff., ER 233, ¶ 11; Dent Aff., ER 195, ¶ 13.

3. The Litigation.

Beijing Ever Bright claims that Richmark Corporation initiated the litigation "without advising or informing Beijing

Ever Bright"; that "fact" is not established anywhere in the record.

4. Attempted Service on Beijing Ever Bright.

Beijing Ever Bright states that the Consular Convention between the United States and the PRC, 33 U.S.T. 2973, T.I.A.S. No. 10209 ("the Consular Convention"), provides an "agreed upon method for service of judicial documents through the consular officers." In fact, of the 42 articles in the Consular Convention, only one article concerns service of judicial documents, and that article does not require or direct such service. Consular Convention, Article 29. Furthermore, there is no "agreement" by either nation to utilize this method of service.

5. The Response of Beijing Ever Bright and the PRC to the Documents Delivered.

Beijing Ever Bright argues that its receipt of the documents served by DHL Worldwide Courier "caused no small amount of confusion at Beijing Ever Bright." However, the record reflects that Beijing Ever Bright's in-house counsel understood that Beijing Ever Bright "must respond or risk having a default judgment taken against it * * * ." Liu Cert., ER 225, ¶ 7.

Beijing Ever Bright states that it did not respond to TFC's claims because of the "domestic situation" in the PRC, "serious diplomatic obstacles," and the "instructions of the Ministry of Foreign Affairs." However, there was never any "instruction" by the Ministry of Foreign Affairs that Beijing Ever Bright should not appear in the litigation. Rather, the Ministry of Foreign Affairs merely denied the application submitted by Beijing Ever Bright's in-house counsel for an exit permit. Liu Cert., ER 225, ¶ 6.

Similarly, the "domestic situation" and other "obstacles" may have impeded the in-house counsel's ability to travel to the United States, but they did not "prevent" Beijing Ever Bright from making an appearance, or at least contacting the court or counsel by letter, telephone, or fax.[4]

During the same period of time that Beijing Ever Bright's in-house counsel had difficulty leaving the PRC, Beijing Ever Bright was able to send two of its officers to Seattle, Washington, to form Ever Bright Timber; those officers retained a large Seattle law firm to handle immigration work. Neupert Aff., ER 233, ¶¶ 3, 20-21, and Exs. P and Q. Beijing Ever Bright was also transferring millions of dollars to Solid Beam in New York during that same period. Ni Zhen Aff., Supp ER Tab 1, ¶ 4, and Ex. B; Neupert Aff., Supp ER 259, ¶ 8.

6. The Immediate Response of Beijing Ever Bright to the Default Judgment.

Beijing Ever Bright neglects to mention that the primary argument that it advanced in its Rule 60(b) motion to set aside the judgment and in its opening brief on appeal was that it was *not* an "agency or instrumentality" of the PRC, as defined in the FSIA. The only argument on personal jurisdiction presented to the district court was a contention that the district court could not exercise personal jurisdiction under the FSIA because Beijing Ever Bright was *not* an "agency or instrumentality" of the PRC.[5]

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[4]Beijing Ever Bright has subsequently been able to retain attorneys in New York, Minneapolis, and Portland to represent it, even though its in-house counsel has apparently remained in the PRC.

[5]Beijing Ever Bright conceded at oral argument on appeal that it is an "agency or instrumentality" of the PRC. *See Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1446 n.1 (1991).

B. The Decision of the Court of Appeals.

Beijing Ever Bright correctly states that the Ninth Circuit Court of Appeals decided the issue of personal jurisdiction by analyzing contacts between Beijing Ever Bright and the United States. However, this analysis was based on the interpretation of the FSIA previously adopted by the Ninth Circuit (and every other circuit) that has addressed the issue. The question of whether the FSIA's personal jurisdiction provision, which bases jurisdiction on contacts with the United States, rather than with the forum state, is constitutional under the Due Process Clause of the Fifth Amendment, was not presented to, nor decided by, the Ninth Circuit.[6]

REASONS FOR DENYING THE WRIT

I. THE CONSTITUTIONAL QUESTION IS NOT RIPE FOR REVIEW BECAUSE IT WAS NOT PRESENTED TO THE COURTS BELOW AND THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE.

A. The Constitutional Question Raised By Beijing Ever Bright Was Not Presented To, Or Decided By, The District Court Or The Court Of Appeals.

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[6]In its opening brief before the Ninth Circuit, Beijing Ever Bright presented two arguments on the issue of personal jurisdiction. First, it argued that the FSIA "is inapplicable to Beijing Ever Bright because Beijing Ever Bright is not an agency or instrumentality of a foreign government." Appellant's Brief, p. 3. Alternatively, Beijing Ever Bright argued that, even if the FSIA applied, as a factual matter, "[t]he contacts that Beijing Ever Bright has had with the United States are significantly less than the contact that the United States Supreme Court has found inadequate for jurisdiction in other cases." Appellant's Brief, p. 3.

Beijing Ever Bright argues that basing personal jurisdiction on a foreign agency's contacts with the United States, as provided in the FSIA, rather than on contacts with the forum state, violates the Due Process Clause of the Fifth Amendment. That issue, which necessarily challenges the constitutionality of the jurisdictional provisions of the FSIA,[7] was not decided by the Ninth Circuit (*see* 937 F.2d at 1444) or by the district court (*see Richmark Corp. v. Timber Falling Consultants, Inc.*, 747 F.Supp. 1409 (D.Or. 1990)).

Under such circumstances, it would be inappropriate for the Court to grant certiorari to address the issue here. The Court does not grant certiorari to address issues that were not raised in the court of appeals. *See, e.g., EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (dismissing writ as improvidently granted because the court's "normal practice * * * is to refrain from addressing issues not raised in the Court of Appeals").

The fact that an agency of a foreign sovereign is involved does not warrant departure from the rule stated above. In *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), the Court declined to address the issue of whether a foreign state had a Seventh Amendment "right" to trial by jury in light of the FSIA, stating:

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[7]Under the FSIA, personal jurisdiction exists whenever an exception to sovereign immunity applies and service of process is effected in accordance with the statute. 28 U.S.C. § 1330(b). The exceptions to sovereign immunity set forth in the FSIA are based upon contacts with the United States, not the forum state. 28 U.S.C. § 1605. Beijing Ever Bright, by challenging on constitutional grounds the district court's exercise of personal jurisdiction based on contacts with the United States, necessarily challenges the constitutionality of the jurisdictional provisions of the FSIA. *See Shaffer v. Heitner*, 433 U.S. 186, 189 (1977) (due process challenge to exercise of personal jurisdiction under Delaware statute "concerns the constitutionality of a Delaware statute").

> "We decline to address this argument because respondent failed to raise it below * * *. * * *
>
> " * * * [W]e lack guidance from the District Court or the Court of Appeals on this issue * * *. * * * We therefore leave for another day the questions respondent's argument raises under the FSIA." 492 U.S. at 38-40 (citations omitted).

The same is true here. Neither the Ninth Circuit nor the district court ruled on the constitutional issue now raised by Beijing Ever Bright. Accordingly, the Court should "leave for another day" the resolution of that issue.

B. The Courts Of Appeals Are Not "Divided" On The Constitutional Issue Raised By Beijing Ever Bright.

As Beijing Ever Bright points out, national contacts were first used in analyzing personal jurisdiction under the FSIA in *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 313-15 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The *Texas Trading* analysis has been expressly adopted in the Ninth Circuit[8] and has been utilized by every court of appeals that has addressed the issue.[9] No court of

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[8] *See, e.g., Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987); *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

[9] *See, e.g., Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453-54 (6th Cir. 1988); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 n.5 (5th Cir. 1985); *Harris Corp. v. National Iranian Radio*, 691 F.2d 1344, 1352-53 (11th Cir. 1982).

appeals has adopted a contrary approach under the FSIA.[10] There is no "split" that needs to be resolved.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, SERVICE OF PROCESS NEED NOT BE EFFECTED UNDER THE OPTIONAL PROCEDURE SET FORTH IN THE CONSULAR CONVENTION.

TFC relies on the Ninth Circuit Court of Appeals' analysis of this issue. *See* 937 F.2d at 1447-48.

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[10]The circuits are also not divided on the issue outside the context of the FSIA. National contacts are used in analyzing personal jurisdiction under the federal securities, antitrust, and other statutes providing for nationwide service of process. Beijing Ever Bright argues that in these other contexts, this Court's opinion in *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-03 (1982), has led to an "erosion" of the rationale for the national contacts test. However, the Ninth Circuit rejected the same argument in *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1413 (9th Cir. 1989); other circuit courts of appeal have agreed. *See, e.g., United Rope Distributors v. Seatriumph Marine*, 930 F.2d 532, 534 (7th Cir. 1991); *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1154 (6th Cir. 1990). No court of appeals has reached a contrary conclusion.

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELIEF UNDER RULE 60(b).

A district court's ruling on Rule 60(b) motion is reviewable "only for abuse of discretion." *Browder v. Director, Ill. Dept. of Corrections*, 434 U.S. 257, 263 n.7 (1978). The Ninth Circuit correctly concluded that there was no abuse of discretion under the circumstances of this case; there is no reason why this Court needs to review the affirmance of that discretionary ruling in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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February 12, 1992

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

(3)

No. 91-1195

In the

Supreme Court of the United States

October Term, 1991

BEIJING EVER BRIGHT INDUSTRIAL COMPANY,
Petitioner,

v.

TIMBER FALLING CONSULTANTS, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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BEIJING EVER BRIGHT INDUSTRIAL COMPANY,
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ON PETITION FOR A WRIT OF CERTIORARI
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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

While Beijing Ever Bright takes issue with the "facts" as presented by Respondent Timber Falling Consultants, Inc. in its Brief in Opposition, it is not necessary to respond point-by-point, since TFC's allegations do not diminish the presentation of the important issues before this Court. In reviewing the "record" to which TFC refers, moreover, the Court must keep in mind the fact that this "record" was produced in the context of a default

judgment.[1] It should suffice to say that, once Beijing Ever Bright was able to make an appearance in this litigation and contest TFC's claims, the district court found that Beijing Ever Bright has meritorious defenses. *See* Petition, App. B at B-9.

I. WHETHER THE AGGREGATE NATIONAL CONTACTS TEST VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IS AN IMPORTANT, UNRESOLVED ISSUE PROPERLY RAISED BELOW AND ADDRESSED BY THE COURT OF APPEALS

TFC's restatement of the first question presented virtually concedes that this case presents important questions:

> The issue, properly stated, is whether the personal jurisdiction provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330, 1602 *et seq.*, ("FSIA"), violate the Due Process Clause of the Fifth Amendment.

TFC's Brief in Opposition To Petition For A Writ Of Certiorari ("Brief in Opposition") at i.

Beijing Ever Bright does not agree that this case necessarily involves a challenge to the constitutionality of the statute authorizing personal jurisdiction;[2] regardless of how the issue is stated, however, whether a district court may, consistent with the Due Process Clause of the

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[1]Contrary to TFC's assertion, Brief in Opposition at 1, n. 1, Beijing Ever Bright has challenged the propriety and sufficiency of the evidence presented by TFC at every step since it has appeared in this litigation. Also, as Beijing Ever Bright pointed out to the courts below, the only authority for many of the "facts" relied upon by TFC are the affidavits of *TFC's own attorneys*.

[2]*See* Petition For A Writ Of Certiorari at 15 n. 17.

Fifth Amendment, assert personal jurisdiction over an alien defendant based on aggregate national contacts is an important issue which this Court has twice noted but not yet had occasion to resolve.[3]

The importance of the national contacts issue is highlighted in other points made in TFC's brief. For instance, TFC correctly notes that in *Go-Video, Inc. v. Akai Elec.*, 885 F.2d 1406, 1413 (9th Cir. 1989), the Ninth Circuit expressly rejected the suggestion that this Court's decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702-03 (1982), removed the theoretical underpinnings of the national contacts test. *See* Brief in Opposition at 9, n. 10.[4] This only belies TFC's claim that there is no "split" among the circuits, since, as noted in the Petition, both the Fifth and Eleventh Circuits have noted an erosion of the national contacts test's rationale in light of *Ireland*. *See In Re Chase & Sanborn Corp.*, 835 F.2d 1341, 1344, n. 8 (11th Cir. 1988), *rev'd on other grounds sub nom., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Burstein v. State Bar of California*, 593 F.2d 511, 515-16 (5th Cir. 1982). Moreover, district courts in those circuits and elsewhere have followed those decisions and expressly rejected the national contacts test. *See* Petition at 18-19 and n. 23.

TFC's principal contention in opposition to certiorari thus is not that the national contacts issue is unimportant; rather it is a claim that the issue was not properly presented below. The record demonstrates otherwise.

In its motion for relief from the default judgment and in its opening brief to the court of appeals, Beijing Ever Bright argued that the appropriate analysis of minimum contacts for personal jurisdiction should be restricted to

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[3]Omni Capital Int'l v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 102, n. 5 (1987); Asahi Metal Industry Co. v. Superior Court of California, Solano County, 480 U.S. 102, 113, n.* (1987); *see* Petition at 14-15.

[4]*See also* Petition at 17-19.

contacts with the forum state (Oregon) in which the federal district court sits. Beijing Ever Bright's Memorandum In Support Of Motion For Relief From Judgment, August 2, 1990, ER 225; Brief of Appellant, November 6, 1990. In its opening brief to the court of appeals, Beijing Ever Bright explicitly argued that the FSIA cannot supercede the constitutional requirement of minimum contacts, and that if there is no jurisdiction over Beijing Ever Bright under the *traditional* minimum contacts analysis, then the FSIA cannot supply it. Brief of Appellant at 9-10. Indeed, TFC found the issue so important and adequately presented in the court of appeals that it devoted several pages of its appellee's brief to addressing the contention that "there is still some question between circuits as to whether the FSIA permits minimum contacts of the defendant to be aggregated for the entire United States." Appellee's Brief at 22-24, *quoting* Brief of Appellant at 10.

Both the district court and the court of appeals squarely addressed the question of the appropriate measure of contacts to support the assertion of personal jurisdiction. Because the court of appeals had earlier addressed the precise constitutional question here raised concerning the national contacts test, it was not necessary to reiterate those views in its opinion in this case. It did, however, both expressly follow and cite those earlier decisions in holding here that "the relevant area in delineating contacts is the entire United States, not merely [the forum state]." Petition, App. A at A–8, *quoting Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987), and *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *See also*, Opinion, October 15, 1990, (Petition, App. B at B-8) ("Ever Bright contends that even if the court finds that the FSIA applies to it, TFC cannot show that Ever Bright has the minimum contacts with the state of Oregon to permit this court to

exercise personal jurisdiction over it. Under the FSIA, personal jurisdiction may be exercised ...[based upon]... contacts with the United States as whole, not merely the forum state..."). TFC's contention that the constitutional issues concerning the national contacts test were neither raised nor decided below is thus simply, and demonstrably, wrong.[5]

II. THE COURT OF APPEALS' OVERLY NARROW ANALYSIS OF THE SERVICE OF PROCESS PROVISIONS OF THE FSIA PRESENTS AN IMPORTANT QUESTION AFFECTING THE VALIDITY AND EFFECT OF INTERNATIONAL AGREEMENTS

TFC apparently does not take issue with the point raised in the Petition that the decision of the court of appeals in this case affects numerous international agreements between the United States and other nations which contain, *inter alia*, provisions for service of process through diplomatic channels. *See, e.g.*, Petition, App. I. TFC also apparently concedes, as it must, that it *could have* effected service through the diplomatic channel established by the Consular Convention between the United States and The People's Republic of China, *see* Petition, App. F, which in turn would have led to proper service in accordance with Chinese law. *See* Waifa No. 47, Petition, App. G.

TFC raises two contentions to justify its resort to a service method that does not follow the Consular

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[5] Even if the court of appeals had not reached the constitutional issues surrounding the national contacts test, review by this Court would nevertheless be appropriate given the importance of the issue. This Court held in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-698 (1984), that, particularly in cases coming from federal courts, the Court may consider questions not specifically passed upon by courts below. *See also Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980) (same).

Convention and is an affront to Chinese law and sovereignty: (1) that the Consular Convention's provisions are not mandatory, and (2) that, as was noted by the court of appeals, the "focus" of the Convention is not exclusively on service of process. Brief in Opposition at 4.

These contentions are no more than red herrings. The restriction in the FSIA on resort to the alternative service methods of 28 U.S.C. § 1608(b)(3) provides that a party may not resort to service under that provision unless "service *cannot* be made under paragraphs (1) or (2)." (emphasis added). Whether or not the provisions of the Consular Convention "focus" on service of judicial documents,[6] or whether or not those provisions are "mandatory," is irrelevant so long as service *could* have been made using the Consular Convention. Indeed, by the terms of the FSIA itself, which the court of appeals seriously misapprehended in its ruling, the Consular Convention's service provisions become "mandatory" in any situation where there is no special arrangement between the parties for service, and no agent of the foreign agency or instrumentality authorized to accept service within the United States. *See* 28 U.S.C. § 1608(b)(1) and (2). The court of appeals' decision in this case effectively reads the limitations out of the FSIA's alternative service provision in section 1608(b)(3), and reads new limitations into the "applicable international convention" language of section 1608(b)(2), both with serious international repercussions. *See* Petition at 26-27.

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[6]While it is true that only one article of the Consular Convention deals directly with service of judicial documents, a number of other articles deal with similar and related judicial-assistance functions of consular officers, such as representation of nationals before courts and other authorities (Art. 24), and notarial functions (Art. 27). *See* Petition, App. F at F-7,8.

III. THE IMPORTANT INTERESTS AND DEMANDS OF INTERNATIONAL COMITY EMBODIED IN THE FSIA REQUIRE A REVIEW OF THE DISTRICT COURT'S AND THE COURT OF APPEALS' ANALYSIS OF "CULPABLE CONDUCT" AND RELIEF FROM THE DEFAULT JUDGMENT

TFC would have this Court view the issue of relief from the default judgment and the "culpable conduct" finding of the district court as merely a question of whether the district court abused its discretion. Brief in Opposition at 10. However, this case involves a foreign litigant -- an instrumentality of a foreign state -- subjected to a default judgment after attempted service of process that did not comply with the foreign state's domestic laws on service of judicial documents, and after receiving an instruction from its government that an appearance in a foreign court would be inappropriate in such circumstances.[7] As this Court noted in *Societe Nationale Industrielle Aerospatiale et al. v. U.S. District Court*, this Court has "long recognized the demands of comity in suits involving foreign states,..." 482 U.S. 522, 546 (1987).

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[7]Contrary to TFC's assertions, Brief in Opposition at 4, the cited record demonstrates that this instruction was much more than a "mere denial of an application" for an exit permit:

> I was advised by the Chinese Ministry of Foreign Affairs that the Ministry denied my application for an exit permit. The Ministry indicated that the denial was based on the reason that under Chinese law it was improper for a Chinese entity like Beijing Ever Bright to make an appearance in a foreign court if service of process made upon the Chinese entity was not made in accordance with (1) a Notice of the Supreme People's Court, Ministry of Foreign Affairs and the Ministry of Justice [Waifa No. 47], or (2) Article 29 of the Consular Treaty between the United States and the P.R.C.

ER 225, Liu Cert. ¶ 6. *See* Petition at 8.

> American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by the foreign state.

Id. at 546 (footnote omitted).

The "special problem" in this case of a default judgment against an FSIA defendant instructed by its government that a response would be inappropriate has arisen on other occasions, and it is apparent from this and the other cases that there is no consistent analysis by American courts on the issues of "culpable conduct" and the appropriateness of relief from the default judgment. *Compare, e.g., Jackson v. People's Republic of China,* 794 F.2d 1490 (11th Cir. 1986), *reh. en banc denied*, 801 F.2d 404, *cert. denied* , 480 U.S. 917 (1987), and *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir.), *cert. denied*, _ U.S. _, 110 S.Ct. 237 (1989) with *Meadows v. Dominican Republic,* 817 F.2d 517 (9th Cir.), *cert. denied,* 484 U.S. 976 (1987) and this case.

CONCLUSION

This case squarely presents important and unresolved issues involving the constitutional limits on federal court exercise of personal jurisdiction over foreign defendants and the obligations of federal courts to recognize the important interests and demands of international comity as embodied in the FSIA. The petition for a writ of certiorari should be granted.

Dated February 17, 1992

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Supreme Court, U.S.
FILED
AUG 25 1992
OFFICE OF THE CLERK

No. 91-1195

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHINA EVERBRIGHT TRADING COMPANY, PETITIONER

v.

TIMBER FALLING CONSULTANTS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act of 1976 violates the Due Process Clause by allowing a federal court to exercise personal jurisdiction over a foreign state based on the foreign state's contacts with the United States, rather than on its contacts with the State in which the federal court sits.

2. Whether the Consular Convention between the United States and the People's Republic of China is "an applicable international convention on service of judicial documents" for purposes of the Foreign Sovereign Immunities Act.

3. Whether petitioner is entitled to relief from a default judgment under Fed. R. Civ. P. 60(b).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner China Everbright Trading Company seeks relief from a default judgment entered by the United States District Court for the District of Oregon in favor of respondent Timber Falling Consultants, Inc. (TFC). Petitioner, which is a "foreign state" for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602 *et seq.*, contends that the district court lacked personal jurisdiction to enter the default judgment, that service was defective, and that it is entitled to relief from the judgment for

"excusable neglect" (Fed. R. Civ. P. 60). The district court refused to set aside the judgment (Pet. App. B1-B12), and the court of appeals affirmed (*id.* at A1-A14).[1]

1. The FSIA provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The statute specifically addresses the questions of subject matter and personal jurisdiction in the federal courts. Section 1330(a), which governs subject matter jurisdiction, states:

> The district courts shall have original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. 1330(a). See *Verlinden*, 461 U.S. at 489.

Section 1330(b), which governs personal jurisdiction, states:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the

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[1] Petitioner filed its petition for a writ of certiorari under the name Beijing Ever Bright Industrial Company. In an April 29, 1992, letter to the Deputy Clerk, petitioner informed the Court that it has since changed its name to China Everbright Trading Company. See Petition For A Writ Of Certiorari, *China Everbright Trading Co.* v. *Timber Falling Consultants, Inc.*, No. 92-31, at ii, n.*.

> district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. 1330(b). Thus, the FSIA provides that a federal district court shall have personal jurisdiction over a foreign state if: (a) the foreign state is amenable to the court's subject matter jurisdiction under the exceptions to foreign sovereign immunity set forth in Sections 1605 through 1607; and (b) the foreign state is properly served under Section 1608.

Section 1605(a)(2) of the FSIA—the immunity exception relevant to this case—provides that a foreign state is not entitled to immunity if the state engages in commercial activity bearing a prescribed relationship to the United States. See 28 U.S.C. 1605(a)(2). Specifically, a foreign state is not immune from suit in any case in which the action is "based upon":

> (i) "a commercial activity carried on in the United States by the foreign state";
>
> (ii) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or
>
> (iii) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

28 U.S.C. 1605(a)(2).[2]

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[2] The FSIA's definitions state:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the

Section 1608(b)—the service provision relevant to this case—provides that service may be accomplished by delivery of the summons and complaint "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. 1608(b)(2). It further provides, however, that if service cannot be made through that method, it may be accomplished through certain other methods of delivery "reasonably calculated to give actual notice," including "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served." 28 U.S.C. 1608(b)(3).

2. Petitioner is a corporation organized under the laws of the People's Republic of China and engaged in import and export trade. In early 1988, petitioner contracted with Richmark Corporation, a U.S. company, to purchase timber. Richmark subcontracted with respondent TFC, which is also a U.S. company, to procure the timber. The dispute before this Court originated when Richmark brought a breach of contract action against TFC based on TFC's failure to deliver the timber as promised. TFC asserted counterclaims against Richmark and third-party claims against petitioner and others, alleging breach of contract, fraud and civil conspiracy, and tortious interference. Pet. App. A5-A6, B5-B6.

On March 20, 1989, TFC served petitioner with a summons and the third party claims through private

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course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. 1603(d) and (e).

express mail delivery to petitioner in Beijing, China. Petitioner did not appear or respond to the summons within the sixty-day period specified in the summons. On June 9, 1989, the district court entered an order of default. Pet. App. A6, B5, C3. Nearly one year later, on June 5, 1990, after all claims against the other defendants had been resolved, the district court entered final judgment against petitioner on the contract, fraud, and civil conspiracy claims. *Id.* at A6, B5. The district court awarded TFC approximately $2.2 million to compensate for lost profits, pre-judgment interest, and assorted expenses. See *id.* at C1-C5.

3. On August 2, 1990, petitioner filed a motion under Rule 60, Fed. R. Civ. P., for relief from the default judgment. Petitioner argued that the judgment was void, because the district court lacked personal jurisdiction over petitioner and because petitioner's failure to appear was excusable in light of political events occurring in China at the time petitioner received notice of the suit. The district court denied petitioner's motion. It concluded that petitioner was a foreign state for purposes of the FSIA and therefore subject to the FSIA's jurisdictional provisions. Pet. App. B7-B8. Noting that the evidence suggested that petitioner had contacts with both the United States and the State of Oregon, the court concluded that petitioner "has failed to produce evidence that tends to establish its defense of lack of personal jurisdiction." *Id.* at B8-B9. The court also observed that petitioner "does not contest that it was properly served under the FSIA" and concluded that the "claim of defective service must also fail." *Id.* at B9. The court rejected petitioner's argument that political

events in China excused its appearance, noting among other things that petitioner had failed to show "why it could not have communicated with the court by mail or other means during the period of more than a year between the time it was served and the entry of the final judgment." *Id.* at B10.

The court of appeals affirmed. The court noted at the outset that petitioner no longer contested that it was a foreign state for purposes of the FSIA. Pet. App. A7 n.1. It concluded that the district court had personal jurisdiction, stating that the issue "under the FSIA is determined by resorting to the traditional minimum contacts tests." *Id.* at A7, citing *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1529 (9th Cir.), cert. denied, 493 U.S. 891 (1989). The court determined that "the relevant area in delineating contacts is the entire United States," citing *Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), cert. denied, 484 U.S. 976 (1987), and that petitioner's contacts with the United States "certainly may be characterized as substantial." Pet. App. A8.

The court of appeals also rejected petitioner's contention that service was defective under the FSIA. Petitioner primarily argued that the Consular Convention between the United States and the People's Republic of China (US-PRC Consular Convention), Feb. 19, 1982, 33 U.S.T. 2973, T.I.A.S. No. 10209, is "an applicable international convention on service of judicial documents," 28 U.S.C. 1608(b)(2), and that Section 1608(b)(3) of the FSIA required TFC to attempt service through the use of that Convention before resorting to private express mail. See 28 U.S.C. 1608(b)(3). The court of appeals rejected that argument, concluding that "[t]he Con-

sular Convention is not an 'applicable international convention *on service of judicial documents*' under § 1608(b)(2). Rather, the convention governs the privileges, activities, and immunities of consulates and their officers." Pet. App. A10.

The court of appeals likewise rejected petitioner's contention that the district court erred in refusing to set aside the default judgment. The court of appeals observed that "[a] district court's decision on a Rule 60(b) motion is reviewed for abuse of discretion." Pet. App. A11-A12, citing *Thompson* v. *Housing Auth. of Los Angeles*, 782 F.2d 829, 832 (9th Cir.), cert. denied, 479 U.S. 829 (1986). The court of appeals held that the district court did not abuse its discretion in concluding that petitioner could not rely on political disruptions in China as an excuse for failing to answer the summons. The court explained that petitioner "simply alleges that the [People's Republic of China] refused to issue it an exit visa." Pet. App. A12-A13. Petitioner "presented no evidence to explain why it could not have communicated with the court through other channels." *Id.* at A13.[3]

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[3] The court of appeals also affirmed the district court's separate order granting a judgment debtor examination. The court of appeals held that it lacked jurisdiction to review petitioner's claim that the order was overbroad, because the district court had not found petitioner in contempt of the order granting the judgment debtor examination. Pet. App. A13, citing *In re National Mortgage Equity Corp. Mortgage Pool Certificates Litig.*, 857 F.2d 1238, 1239 (9th Cir. 1988). Petitioner does not contest that ruling in its petition for a writ of certiorari.

DISCUSSION

Petitioner urges this Court to grant the petition for a writ of certiorari to resolve three issues: (1) whether a federal court may constitutionally exercise personal jurisdiction over a foreign party based on its "national contacts" (Pet. 13-23); (2) whether the US-PRC Consular Convention is an "applicable international convention on service of judicial documents" for purposes of Section 1608(b)(2) of the FSIA (Pet. 24-27); and (3) whether the court of appeals erred in affirming the district court's refusal to set aside a default judgment under Rule 60, Fed. R. Civ. P., for "excusable neglect" (Pet. 27-30). In our view, the petition does not raise issues currently warranting this Court's attention.

1. As this Court has explained, a federal court generally may not exercise personal jurisdiction over a non-consenting foreign defendant unless there is "a constitutionally sufficient relationship between the defendant and the forum" and "authorization for service of summons on the defendant." *Omni Capital Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). The Court has not definitively determined what contacts between a foreign defendant and the forum create a "constitutionally sufficient relationship" in those cases in which Congress has authorized extraterritorial service of process. *Id.* at 102 n.5. See also *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 113 n.* (1987). The courts of appeals, however, have held that a federal court should examine whether the defendant has a sufficient relationship with the United States as a whole, rather than with the particular State where the federal court sits. See, *e.g.*, *Go-Video, Inc.* v. *Akai Elec. Co.*, 885 F.2d 1406, 1414 (9th Cir. 1989) (Clayton Act); *Se-*

curities Investor Protection Corp. v. *Vigman*, 764 F.2d 1309, 1315-1316 (9th Cir. 1985) (Securities Exchange Act); *Fitzsimmons* v. *Barton*, 589 F.2d 330, 333 & n.4 (7th Cir. 1979) (Securities Exchange Act); *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1340-1341 (2d Cir. 1972) (Securities Exchange Act). Cf. *Chandler* v. *Barclays Bank PLC*, 898 F.2d 1148, 1154 (6th Cir. 1990) (refusing to apply a "national contacts" test in the absence of an applicable federal statute authorizing nationwide service of process).

Petitioner argues that this Court should grant review to resolve the constitutionality of the "national contacts" test. Pet. 14-15. As petitioner acknowledges, however, there is no square conflict among the courts of appeals on that question. Pet. 19.[4] Even if such a conflict existed, this case would not be an appropriate vehicle by which to resolve it. The FSIA does not simply provide for extraterritorial service of process. Rather, it provides a "comprehensive set of legal standards" for exercising juris-

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[4] Petitioner asserts that this Court's decision in *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites*, 456 U.S. 694 (1982), which holds that the personal jurisdiction requirement restricts judicial power "not as a matter of sovereignty, but as a matter of individual liberty" (*id.* at 702), "has led several courts to reassess the requirements of personal jurisdiction in federal cases with nationwide or worldwide service of process." Pet. 18. Although petitioner cites two court of appeals cases among its examples, neither case rejects the "national contacts" standard or expressly indicates any "erosion" (*id.* at 19) of that standard. See *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1344 n.8 (11th Cir. 1988), rev'd on other grounds *sub nom. Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989); *Burstein* v. *State Bar of California*, 693 F.2d 511, 515-516 (5th Cir. 1982).

diction over foreign states. *Verlinden*, 461 U.S. at 488. Unlike the Clayton Act, 15 U.S.C. 22, or the Securities Exchange Act, 15 U.S.C. 78aa, which simply allow service on the defendant "wherever" found, the FSIA specifically states when "[p]ersonal jurisdiction over a foreign state shall exist." 28 U.S.C. 1330(b).

As we have explained, the FSIA affirmatively grants a federal court personal jurisdiction over a foreign state in any case in which the FSIA deprives the foreign state of immunity. 28 U.S.C. 1330(b). See pp. 2-3, *supra*. Of particular relevance here, the FSIA provides that a foreign state shall not be immune from the jurisdiction of those courts in any case

> in which the action is based upon a commercial activity carried on *in the United States* by the foreign state; or upon an act performed *in the United States* in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect *in the United States*.

28 U.S.C. 1605(a)(2) (emphasis added). Section 1603(e) defines a "commercial activity carried on in the United States by a foreign state" as commercial activity having "substantial contact with the United States." 28 U.S.C. 1603(e). Thus, the FSIA expressly employs a "national contacts" test in determining whether a foreign state is subject to a federal court's personal jurisdiction in cases involving commercial activity.[5]

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[5] Congress quite naturally employed a national contacts test in that context. As this Court has noted, "[f]or local

Petitioner's due process challenge, which rests on the broad assertion that "personal jurisdiction based on aggregate national contacts violates the Due Process Clause" (Pet. 14), is ineluctably a challenge to the FSIA's personal jurisdiction provisions. Those provisions are the basis for the court's exercise of jurisdiction over petitioner, and they are the source of the "national contacts" test in this case. Although petitioner suggests otherwise, this Court cannot resolve petitioner's due process challenge without inquiry into the constitutionality of a federal statute, which would involve the Court in "the gravest and most delicate duty" it can be called upon to perform. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981).[6]

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interests, the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Chae Chan Ping* v. *United States*, 130 U.S. 581, 606 (1889). See *United States* v. *Belmont*, 301 U.S. 324, 331-332 (1937).

[6] Petitioner contends that its challenge "is not to the constitutionality of 28 U.S.C. §§ 1330 or 1608 as such, but rather to their application here ostensibly to obtain personal jurisdiction over petitioner based on an aggregate of national contacts." Pet. 15 n.17. Petitioner fails to explain, however, what distinguishes the application of the FSIA here from its application in any other situation in which personal jurisdiction is asserted over a foreign state "based upon commercial activity carried on in the United States." 28 U.S.C. 1605(a)(2). Petitioner also makes the narrower argument that "personal jurisdiction based on aggregate national contacts violates the Due Process Clause of the Fifth Amendment where the cause of action asserted is based on state law" (Pet. 22). That argument, however, is also a challenge to the Act itself, because Section 1330(b) facially applies "to every claim for relief" over which the district courts have subject matter jurisdiction under 28 U.S.C. 1330(a), and petitioner does not contend that the district court would lack subject matter jurisdiction over state law claims.

There is no current need for this Court to examine the constitutionality of the FSIA. We know of no court decision holding that the FSIA is unconstitutional, and the lower courts have repeatedly applied the FSIA's national contacts test without suggestion that the test violates due process. See, *e.g.*, Pet. App. A8; *Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), cert. denied, 484 U.S. 976 (1987); *Maritime Int'l Nominees* v. *Republic of Guinea*, 693 F.2d 1094, 1105-1109 (D.C. Cir. 1982), cert. denied, 464 U.S. 815 (1983); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 314-315 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). Indeed, a substantial antecedent question exists whether a foreign state is even entitled to protection under the Due Process Clause. See *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2169 (1992). That question apparently was not raised below and should not be addressed for the first time in this Court.[7]

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[7] Assuming that petitioner is entitled to invoke the Due Process Clause, petitioner would be required to shoulder a "heavy burden" in demonstrating that Congress exceeded constitutional limits. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Congress drew upon due process principles when formulating the FSIA's personal jurisdiction provisions. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13-14 (1976). Moreover, the courts are obligated to give great respect to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). That respect is especially appropriate in the case of legislation involving the United States' relations with foreign nations. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

2. Petitioner's contention (Pet. 24-27) that the court of appeals erred in refusing to treat the US-PRC Consular Convention as an "applicable international convention on service of judicial documents," 28 U.S.C. 1608(b)(2), also does not warrant further review. The court of appeals correctly concluded that the consular convention, which "governs the privileges, activities, and immunities of consulates and their officers" (Pet. App. A10), is not a service convention. "The fact that one of forty-two articles (Article 29) in the convention allows consular officials to serve legal documents does not convert the focus of the convention to service of judicial documents." Pet. App. A10-A11.[8]

The legislative history of the FSIA supports that conclusion. The House Report does not equate consular conventions with service conventions. Instead, it states:

> The *only* such convention [on service of judicial documents] to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents [Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163].

H.R. Rep. No. 1487, *supra*, at 24 (emphasis added). There is no merit to petitioner's argument that the US-PRC Consular Convention would have been included as a service convention if it had been in effect at the time. Pet. 25. The Vienna Convention on Con-

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[8] Article 29, 33 U.S.T. 2998, which provides in relevant part that a "consular officer shall be entitled to serve judicial and other legal documents," merely allows—but does not require—service through consular channels. See Pet. App. F9-F10.

sular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261, similarly states that "consular functions" shall include "transmitting judicial and extra-judicial documents." Art. 5(j), 21 U.S.T. 84. Although the Vienna Convention has been in effect in the United States since 1969 and was therefore in effect when the House Report was prepared, the House Report did not list it as a service convention within the meaning of Section 1608 (b)(2).

In short, the court of appeals correctly held that the US-PRC Consular Convention is not an "applicable international convention on the service of judicial documents." 28 U.S.C. 1608(b)(2). Because the consular convention falls outside the scope of Section 1608(b)(2) of the FSIA, and the People's Republic of China was not a party to the Hague Service Convention at the time of service in this case, TFC was entitled to invoke the service provisions of Section 1608(b)(3)(B) of the FSIA. Petitioner does not cite any conflicting judicial decision and does not identify any other compelling reason for further review.

3. Petitioner's contention that the court of appeals erred in refusing to set aside the default judgment (Pet. 27-30) also warrants no further review. The courts of appeals apply an "abuse of discretion" standard when reviewing a district court's resolution of a motion pursuant to Rule 60(b), Fed. R. Civ. P., to set aside a default judgment. See, *e.g.*, *Thompson v. Housing Auth. of Los Angeles*, 782 F.2d at 832. See generally 11 C. Wright & A. Miller, *Federal Practice and Procedure* 2857, 2872 (1973). Petitioner does not quarrel with that standard, but argues in-

stead that the district court did not give sufficient weight to various factors in finding that petitioner's neglect was not "excusable." Fed. R. Civ. P. 60(b). See Pet. 27-28.

The court of appeals properly held that the district court did not abuse its discretion in weighing the relevant factors. Petitioner basically alleges that it knew that "the summons merited some response," but its legal officer, Liu Yan-Sheng, did not appear or otherwise respond because the "domestic situation in the People's Republic of China and numerous serious diplomatic obstacles prevented Liu from obtaining a visa." Pet. 8-9. The district court concluded that those allegations did not suffice to establish excusable neglect, stating:

> The court accepts the fact that public events in the People's Republic of China disrupted the conduct of business in Beijing in 1989, and ha[ve] disrupted relations between the United States and the People's Republic of China to the present time. However, [petitioner] does not present evidence that it made any other efforts to respond to the claims of TFC, or to secure an extension of time from TFC, despite Liu's admitted knowledge that failure to respond could result in a default judgment. On the other hand, TFC has presented evidence that during this same period of time, [petitioner] was able to secure counsel in the States of Washington and New York to deal with other matters. [Petitioner] has submitted no evidence showing why it could not have acted through such counsel or why it could not have communicated with the court by mail or other means during the period of more than a year between the time it was served and the entry of the final judgment.

Pet. App. B10. The court of appeals concluded that "[i]n light of this evidence, we cannot say that the district court abused its discretion." Pet. App. A13. That conclusion, which simply holds that the district court did not act arbitrarily in applying Rule 60(b) to the facts of this case, does not present a question of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 60013

Supreme Court, U.S.
FILED
SEP 4 1992
OFFICE OF THE CLERK

No. 91-1195

In The
Supreme Court of the United States
October Term, 1992

CHINA EVER BRIGHT TRADING COMPANY,
Petitioner,

vs.

TIMBER FALLING CONSULTANTS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

INTRODUCTION

Pursuant to Rule 15.7 of this Court, Petitioner China Everbright Trading Company ("Everbright") submits this Supplemental Brief to respond to certain of the views expressed in the Brief for the United States as Amicus Curiae recently filed in this matter. Mindful of the admonition of the Rule that a brief such as this is to be "restricted to new matter," Everbright respectfully notes its disagreement with many of the characterizations and conclusions of the United States' Brief, and urges this Court to review Everbright's petition and reply brief, wherein Everbright's position is set forth as to the current

importance of the questions presented and the reasons that review should be granted.[1]

Certain features of the Solicitor General's discussion of the FSIA, however, deserve additional comment. In a sense, the brief of the United States is remarkable more for its omissions than for its affirmative content. Nowhere does the Solicitor General state the view that application of the national contacts test to a foreign state-owned trading entity under the circumstances of this case is constitutional under the Due Process Clause, nor does he appear to recognize that lower courts have seen the need to construe the jurisdictional provisions of the FSIA liberally, in light of the legislative intent, to avoid constitutional infirmity. Rather, he confines himself to the observation that there is as yet no "square" conflict among courts of appeals' decisions applying the pertinent provisions of the FSIA. And, although the point was directly raised in the petition and thus presumably was among the matters as to which this Court sought the views of the United States, there is no mention in the Solicitor General's brief of the effects on the foreign relations of the United States that must inevitably result from the discrimination inherent in applying a national contacts test to foreign state-owned trading companies while at the same time applying a state contacts test to legally identical claims against domestic corporations or even privately-owned foreign corporations. (See Pet. at 19-21 and 22-23).

By implication, the United States has taken the position that the importance of these questions, some of

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[1] The Court is also respectfully reminded of the pending Motion for Consideration in Tandem, wherein Everbright requests the Court to consider this petition along with its separate petition in No. 92-31 and the sensitive questions concerning the conflict between laws of the United States and the People's Republic of China raised therein.

which this Court has previously noted,[2] turns solely on whether there is a direct conflict among appellate court opinions and not on the nature of the questions themselves or on their impact on foreign sovereigns and their trading entities. Indeed, this surprisingly insular attitude is reflected in the United States' notation of what it calls the "substantial antecedent question" of "whether a foreign state is even entitled to protection under the Due Process Clause." (*See* Br. of U.S. at 12).

If the Executive Branch seriously entertains any doubt as to whether foreign sovereigns, their agencies and instrumentalities involved in proceedings before courts of the United States are entitled to the protections of the Due Process Clause, then surely that is an issue that should be resolved, not allowed to linger. Neither the Congress nor those federal courts that have addressed the issue appear to have shared any such doubt. The United States itself concedes in its brief that Congress took the Due Process Clause into account in formulating the FSIA's jurisdictional provisions (*See* Br. of U.S. at 12 n. 7; see also Pet. at 16 n. 18 and H.R. Rep. No. 1487, 94th Cong., 2d Sess. quoted therein). And the Court of Appeals for the Second Circuit made its own view clear in stating that, when the drafters of the FSIA explained that the "minimum contacts" requirement was "embedded" in 28 U.S.C. § 1330(b), they were merely "confirming what they had no power to deny." *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 n. 36 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

The Solicitor General concludes that "[t]here is no current need for this Court to examine the constitutionality of the FSIA" on the grounds that "we know of no

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[2] *See Asahi Metal Industry v. Superior Court*, 480 U.S. 102, 113 n. * (1987), and *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 102 n. 5 (1987) (noting, but not deciding, questions concerning national contacts test and due process); *see also* Petition at 14-15.

court decision holding that the FSIA is unconstitutional" (Br. of U.S. at 12). With the greatest respect, apart from the fact that this statement is something of a *non sequitur* in itself, it ignores the point that a number of courts have found it necessary to engraft due process requirements onto the jurisdictional provisions of the FSIA in a manner which has obviated the need for constitutional challenge to the FSIA itself.

The Solicitor General's assertion that "Petitioner's due process challenge ... is ineluctably a challenge to the FSIA's personal jurisdiction provisions" (Br. of U.S. at 11) is not entirely accurate, as it assumes that the pertinent provisions of the FSIA are cast in terms so clear as not to be susceptible of construction in accordance with the requirements of due process. Petitioner's challenge is to the constitutionality of those provisions *as construed and applied in this case*. This Court need not share the view of the Second Circuit in *Texas Trading* to conclude that Congress intended to conform the jurisdictional provisions of the FSIA to the contours of the Due Process Clause. It need not necessarily reach the question whether Congress was constitutionally compelled to do so, though it may find unavoidable the question whether the discrimination inherent in the assertion of jurisdiction under the circumstances of this case violates the fundamental precepts of the Due Process Clause as incorporated in the FSIA.

Such an approach would concededly require the Court to go beyond the bare textual analysis of the FSIA's jurisdictional provisions proferred by the United States and look to the underlying intent of Congress, as well as to the limitations flowing from its intentional adherence

to due process standards.[3] In fact, there is nothing in the legislative history of the FSIA that would support the proposition that Congress either knowingly or intentionally extended the jurisdiction of United States courts over FSIA defendants beyond the limits that would apply in respect of any other defendant in the same

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[3] The Solicitor General arrives at his conclusion that Petitioner has mounted a frontal assault on the constitutionality of the FSIA itself through a textual analysis that attributes to the statutory language a transparency and simplicity of application that the lower courts have found wanting. *See* Br. of U.S. at 3. While there is nothing inaccurate about the Solicitor General's description of the statutory text, it ignores the complexities the courts have identified:

> The [FSIA] is complex and largely unconstrued ... . In structure, the FSIA is a marvel of compression. Within the bounds of a few tersely-worded sections, it purports to provide answers to three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant. ... Through a series of intricately coordinated provisions, the FSIA seems *at first glance* to make the answer to one of the questions, subject matter jurisdiction, dispositive of all three. ... This economy of decision has come, however, at the price of considerable confusion in the district courts. In fact, Congress intended the sovereign immunity and subject matter jurisdiction decisions to remain slightly distinct, and it drafted the Act accordingly. Moreover, Congress had only an incomplete power to tie personal jurisdiction to subject matter jurisdiction; its prerogatives are constrained by the due process clause. These cases present an opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act.

Texas Trading, supra, 647 F.2d at 306-07 (emphasis supplied). The retreat of the Executive Branch behind what can only be described as an oversimplification of the statutory structure as a predicate for its conclusion that petitioner's argument is a "challenge to the Act itself" (Br. of U.S. at 11n.6) should not be allowed to obscure the point that petitioner's due process argument is necessarily directed, in the first instance, to the question whether the jurisdictional provisions of the FSIA can be construed in a manner that conforms to the intent of Congress that due process requirements be observed.

circumstances, *i.e.*, the limits imposed by the Due Process Clause.

In enacting the FSIA, Congress sought simply to codify the "restrictive theory" of sovereign immunity, which since 1952 had been applied by the Executive Branch in its determinations as to whether to recognize claims of immunity in particular cases. The purpose of the codification was to remove from the Executive Branch responsibility for determinations as to the legitimacy of claims of sovereign immunity and to entrust such determinations instead to the courts, based on objective legal standards. House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News 6607. In carrying out this purpose, Congress intended nothing more nor less than to put state trading entities and other "instrumentalities" engaged in "commercial activities" on the same footing before United States courts as privately-owned entities, whether domestic or foreign. *Id.* at 6607-08. There is no indication in the legislative history that Congress intended to put "agencies and instrumentalities" in a *worse* position than other commercial entities.

The discriminatory effect of the rule applied by the Ninth Circuit in upholding the District Court's assertion of personal jurisdiction over Petitioner is dramatically highlighted by this very case. The District Court's finding of personal jurisdiction over petitioner here was cast in bold relief by its dismissal of substantially identical claims asserted in the same case against a Texas corpora-tion, co-defendant on the third-party counterclaim asser-ted against petitioner, which the District Court found did not have sufficient contacts with the *State of Oregon* to warrant the exercise of jurisdiction under the standards first enunciated by this Court in *International Shoe v. Washington*, 326 U.S. 310 (1945). *See* Petition at 21-22. The same standard would have been applied had the Texas

corporation instead been a privately-owned entity organized under the laws of a third country, as is clear from this Court's decision in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). In *Helicopteros*, the relevant contacts for purposes of assertion of personal jurisdiction over a Colombian corporation which was *not* an "instrumentality of a foreign state" within the meaning of the FSIA were held to be those of the corporation with the *State of Texas*. Thus, there has been clear discrimination against petitioner here based solely on the fact that it is an "instrumentality of a foreign state" for purposes of the FSIA or, in less technical terms, because it is a state trading entity.

The discrimination in question is not without serious adverse implications for all state trading entities of the People's Republic of China and other countries similarly situated.[4] As this Court has recognized, the courts of the United States are attractive to plaintiffs having claims, real or imagined, against foreign defendants arising out of a broad range of transactions and activities, some of which have only a minimal relationship to the United States. *See Piper Aircraft Corporation v. Reyno*, 454 U.S. 235, 251-

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[4] A decision of the United States District Court for the Northern District of Illinois provides a further example of the discriminatory treatment accorded FSIA entities -- and in that particular case another entity found to be an agency or instrumentality of the People's Republic of China -- in analyzing the constitutional requirements for exercise of personal jurisdiction. *Miller and Company v. China National Minerals Import & Export Corp.*, 1991 U.S. Dist. Lexis 11973, No. 91 c 2460 (N.D.Ill. Aug.27, 1991). After concluding that the defendant in a state law breach of contract matter lacked minimum contacts with the state of Illinois, the district court in *Miller* nevertheless concluded that it could exercise personal jurisdiction based on the defendant's national contacts because the defendant was an agency or instrumentality of the People's Republic of China. 1991 U.S. Dist. Lexis 11973 at *10-*12. (The district court granted China National's motion to dismiss, however, on the alternative ground that the contracts at issue were subject to an arbitration clause. *Id.* at *18-*20).

252 n. 17, (1981), *reh. denied*, 455 U.S. 928 (1982). This Court has also recognized the extraordinary difficulties and hardships confronting a foreign party in dealing with litigation in the United States. *Asahi Metal Industry v. Superior Court*, 480 U.S. 102, 114 (1987) ("the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.") Adherence to a rule under which a state trading entity of the People's Republic of China is more likely to be haled into a United States court than, for example, a privately-owned company organized under the laws of Colombia thus works a real hardship on the former and can only detract from the international reputation for even-handed justice enjoyed by the courts of this country.[5]

Notwithstanding the strong inference from the legislative history that Congress could not have intended the jurisdictional provisions of the FSIA to be applied in a manner which discriminated against state trading entities, the United States in its brief appears to assume that Congress intended that personal jurisdication exist *somewhere* in the United States with respect to *every* suit on claims from which foreign states, their agencies and

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[5] In fact, the hardship in this particular case is unusually severe, in that the national contacts test as applied in this case was used as the basis for the assertion of *general* jurisdiction. Thus, if the decisions below are allowed to stand, petitioner and other state trading entities similarly situated will be subject to the personal jurisdiction of state and federal courts *everywhere* in the United States on *all* claims against them as to which they do not enjoy immunity under the 28 U.S.C. § 1605. In light of the relatively strict criteria established by this Court for the exercise of general jurisdiction, this result is particularly anomalous, and the unfairness inherent in the discrimination resulting from the application of the national contacts test is particularly acute. *Compare Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) *and Perkins v. Benguet Consolidated Mining Co.*, 341 U.S. 347 (1952).

instrumentalities are not immune.[6] Such an assumption, however, would find no support whatever in the legislative history or indeed in the underlying purposes of the FSIA. To the contrary, it is clear that the congressional purpose was limited to the removal of unique obstacles to suits against foreign sovereigns, their agencies, and instrumentalities which were otherwise *already within* the personal and subject matter jurisdiction of United States courts prior to the enactment of the FSIA, and did not include obliteration of otherwise applicable limitations or safeguards concerning the exercise of personal jurisdiction.[7]

Nor would it be unfair to potential plaintiffs to apply the FSIA in accordance with this purpose and with the requirements of due process. The dismissal for lack of jurisdiction in *Helicopteros* was upheld notwithstanding the fact that, from all that appears, there was no assurance that personal jurisdiction could have been obtained over the defendant before any other United States court. There is no automatic right to bring a claim in a United States court against a foreign entity having no domicile in the United States, other than on the basis of the sufficiency of contacts with the forum under the standards ennunicated in *International Shoe* and its progeny.

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[6] This is, in any event, the import of the Solicitor General's reading of the text of the Act; *see* Br. of U.S. at 2-3, 10.

[7] The problem to which the FSIA was addressed was not a lack of *jursidiction* of United States courts over foreign sovereigns or their commercial entities, but rather the lack of an objective legal standard against which the courts, rather than the State Department, could determine the validity of the *defense* of sovereign immunity in particular cases. House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Admin. News 6606.

CONCLUSION

The questions presented by this case are important, and should be reviewed by this Court. The petition for a writ of certiorari should be granted.

Dated: September 3, 1992.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 28 1992
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Nos. 91-1195 & 92-31

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

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Petitioner,

vs.

TIMBER FALLING CONSULTANTS, INC.,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR CONSIDERATION IN TANDEM

Petitioner China Everbright Trading Company ("Everbright")[1] has filed with this Court two Petitions for Writs of Certiorari in Case Nos. 91-1195 and 92-31, both arising ultimately out of the same action in the United States District Court for the District of Oregon, seeking review of orders of two panels of the United States Court of Appeals for the Ninth Circuit in separate appeals. Shortly after filing the

1 Respondent Timber Falling Consultants, Inc. ("TFC") suggests that Everbright somehow has violated district court orders with respect to advising TFC of its name change (from the former Beijing Ever Bright Industrial Company). Response to Motion for Consideration In Tandem at 1 n.1. Although the name change is wholly irrelevant to the proceedings pending before the Court, Everbright here notes that it served copies on TFC of all of the following: the April 29, 1992, letter to Francis J. Lorson, Esq., Chief Deputy Clerk, notifying this Court of the name change; the April 29, 1992, letters to the Clerk of Court of the Court of Appeals for the Ninth Circuit advising that court of the name change; and the April 30, 1992, Notice of Formal Name Change filed in Civ. No. 88-1203FR in the District of Oregon.

4 pp

second petition in Case No. 92-31, Everbright moved this Court to have the two petitions considered in tandem. Respondent Timber Falling Consultants, Inc. ("TFC"), however, opposes tandem consideration on the two grounds that the petitions raise separate issues and that it will be prejudiced if consideration of the first petition is delayed to facilitate tandem consideration. Response To Motion For Consideration In Tandem at 2.

It certainly is true that the two petitions present separate questions; Everbright noted that in its motion, and explained that each petition independently is worthy of the Court's review.[2] TFC's response, however, neither denies nor challenges the facts that the two petitions involve the same parties and background facts, arise out of the same proceeding, and will, if considered in tandem, allow the Court to examine each important question presented in the full context of the proceedings below and provide for the most efficient and effective presentation of the issues.

As for the delay and alleged prejudice that TFC claims, consideration of both petitions in tandem cannot, as a practical matter, delay consideration of the first petition: the Court currently is awaiting the response of the Solicitor General to its March 9, 1992, request for the views of the United States on the petition in Case No. 91-1195. Presumably those views will be presented yet this summer, and the Court

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[2] Everbright chooses not to be drawn into a reply on TFC's comments on the merits of the two pending petitions except to note that, contrary to TFC's representation, the issues in the first petition in fact were repeatedly and timely raised, and actually ruled upon, as noted in Everbright's reply brief in Case No. 91-1195. See Petitioner's Reply to Respondent's Brief in Opposition at 4-5.

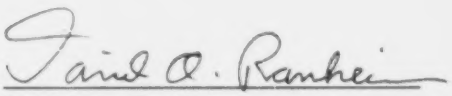
will not, in any event, consider the first petition until those views are received. If the views of the United States are received this summer, both cases will be ready for the Court's consideration at its September Conference. Thus, there will be no delay in consideration of the first petition -- and therefore no prejudice to TFC -- by setting the first petition for consideration in tandem with the second.

CONCLUSION

Petitioner China Everbright Trading Company respectfully requests this Court to grant its motion and set Everbright's two petitions on its docket for consideration in tandem.

Dated: July 27, 1992

Respectfully submitted,



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(SUP. CT. RULE 29.5(c))

STATE OF MINNESOTA }
} SS
COUNTY OF HENNEPIN }

C. Ann Olson, being first duly sworn on oath, deposes and states as follows:

1. That on the 28th day of July, 1992, she did send by United States mail, pursuant to Supreme Court Rules 29.3 and 29.4(b), a mailing container properly sealed and with first class postage prepaid to:

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The Honorable Kenneth W. Starr
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one copy of Petitioner's Reply in Support of Motion for Consideration in Tandem.

2. All parties required to be served have been served.

Subscribed and sworn to before me
this 28th day of July, 1992.

Notary Public

JENNIE M. SMITH
NOTARY PUBLIC – MINNESOTA
HENNEPIN COUNTY
My Commission